Supreme Court, U.S.
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No. 97-___

In The

Supreme Court of the United States

October Term, 1997

MICHELLE BAZZETTA, et al.,

Petitioners,

v.

KENNETH McGINNIS, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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98 pp

QUESTIONS PRESENTED

I. DID THE DISTRICT COURT AND THE APPEALS COURT BELOW ERR AS A MATTER OF LAW IN FINDING THAT NEITHER PRISONERS NOR THEIR FAMILY MEMBERS POSSESS ANY CONSTITUTIONAL RIGHTS IMPACTED BY PROHIBITIONS ON VISITATION WITH EACH OTHER.

II. WHERE THE SIXTH CIRCUIT FOUND THE *TURNER v SAFELY* STANDARD TO BE ONE OF LAW AND HELD THAT THE FACTUAL PRESUMPTIONS OF RULE 56 DO NOT APPLY TO A REVIEW OF PRISON REGULATIONS, DID THE COURT ERR.

III. DID THE CIRCUIT COURT ERR IN AFFIRMING THE DISTRICT COURT WHERE THE COURT FAILED TO PERFORM AN ADEQUATE INQUIRY AS REQUIRED BY *TURNER*.

IV. DID THE CIRCUIT COURT ERR IN APPLYING A LOWER SCRUTINY TEST TO REVIEW PETITIONERS' EQUAL PROTECTION CLAIM ON BEHALF OF MINOR SIBLINGS OF PRISONERS.

PARTIES TO THE PROCEEDING

Petitioners, Michelle Bazzetta, Stacy Barker, Toni Bunton, Debra King, Shante Allen, Adrienne Bronaugh, Alesia Butler, Tamara Prude, Susan Fair, Valerie Bunton and Arturo Zavala, through his Next Friend Valerie Bunton, on behalf of themselves and all others similarly situated and represent a certified class of individuals comprised of members of the public and community prisoners under the jurisdiction of the Michigan Department of Corrections whose ability to visit with each other was prohibited by the Michigan Department of Corrections' administrative rules restricting visitation in Michigan's prisons.

Respondents are Kenneth McGinnis, Director of the Michigan Department of Corrections and the Michigan Department of Corrections.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is published at 124 F.3d 774 (1998), App. 8. A Supplementary Opinion by the Sixth Circuit is published at 133 F.3d 382 (1998), App. 3. The Sixth Circuit's order denying Plaintiffs' Motion for Rehearing and Suggestion for Rehearing En Banc is reprinted as App. 1. The opinions of the United States District Court for the Eastern District of Michigan, from which appeal were taken are published at 902 F. Supp. 765 and reprinted at App. 22, and reprinted at App. 40.

JURISDICTION

The opinions of the United States Court of Appeals for the Sixth Circuit were issued on September 4, 1997 and January 5, 1998 (Supplementary Opinion). Plaintiffs request for rehearing and suggestion for rehearing en banc were denied on February 2, 1998. This court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional, statutory provisions and Administrative Rules applicable to this case begin at App. 53.

STATEMENT OF THE CASE

A. Factual Statement

This class action was filed on behalf of members of the public community and prisoners in the State of Michigan to challenge prison rules restricting visitation between prisoners and members of their families and prisoners and community workers.

Visitation with prisoners in Michigan is governed by a series of Rules and Regulations. There are strict limitations on the number of visits allowed per year for each prisoner. The length and type of visit are conditioned upon the prisoners' security level and the visitors behavior. Prisoners are strip searched before and after each visit. Visitors are searched by metal detectors and clothed body searches are performed on each visitor. The visiting rooms are monitored by surveillance and in-person staff. Petitioners do not challenge these pre-existing restrictions.

However, on August 16, 1995, new regulations identifying, by category, who could visit prisoners in Michigan were enacted. (App. 54, R 791.6609). It is these restrictions for which review is sought. Prison authorities instituted a rule requiring preapproval, after a thorough screening of a detailed application, of all non-attorney visitors prior to being placed on a prisoners' approved visitor list. (App. 55). Certain categories of people are excluded from consideration for the approved visitor list: 1) anyone under the age of eighteen (18) unless proven to be the child, step-child or grandchild of the prisoner; 2) the child, step-child or grandchild may not visit unless accompanied by a court-appointed legal guardian or by an immediate family member, as separately defined by the prison authorities. (App. 57). Further, the child, step-child or grandchild of a prisoner may not visit if parental rights have been terminated

by adoption or any other mechanism, irrespective of visitation agreements or court orders for visitation.

The regulations prohibit visitation between prisoners and their minor brothers, sisters, nieces, nephews, godchildren and children who have been parented by a prisoner but who are not the natural child of that prisoner. The rules prohibit visitation between incarcerated parents and their children where the parent has placed the child with an individual who does not conform to the prison authorities' definition of an immediate family member or legal guardian.[1]

The visitation restrictions also prohibit volunteer groups, community workers, tutors and counselors from visiting more than one prisoner in Michigan.

The regulations severely impinge on the surviving mechanism to maintain integral family relations with incarcerated individuals.

Petitioner Alesia Butler and her husband raised their 11 year old nephew, Nicholas, as their own son, since his mother (Ms. Butler's sister) was shot and killed when he was three months old. Ms. Butler was incarcerated when Nicholas was six years old for a sentence of 10 years and Ms. Butler's husband, with whom Nicholas continues to reside, had brought him for weekly visits for five years until the rules prohibited Ms. Butler from any visitation with Nicholas despite their parent/child relationship and the fact that she is the only mother Nicholas has ever known. The child will not be able to see his putative mother for seven years, when he reaches the age of 18, or until Petitioner completes her sentence.[2]

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[1]It was estimated that this restriction alone would result in prohibiting over 50% of the visits between children and their incarcerated parents.

[2]While the Rules potentially allow for visits by aunts or uncles of prisoners if they served as surrogate parents to the prisoner, the rules do not recognize that prisoners may serve in the capacity "as a surrogate

Petitioner Arturo Zavala, a 15 year old who suffers from cerebral palsy and a severe speech defect is prohibited from visiting his only sibling, Petitioner Toni Bunton, herself only 17 years old upon incarceration. It was unchallenged below that there was no real alternative association available to Petitioner Arturo Zavala and other minor children who either by age or disability could not effectively communicate by letter or telephone.

Petitioner Stacy Barker, after being sentenced to a life sentence, voluntarily terminated her parental rights with her 8 year old daughter, Donna, by placing her in an open adoption in order to provide her with a stable and nurturing family environment. All parties to the adoption agreed it was in the child's best interest to maintain regular visitation with her birth mother and Donna was taken to the prison for weekly visits. Under the challenged regulations, the visitation restriction constitutes a lifetime ban on any visits between this mother and child. (App. at 56, R 791.6609(6)).

Petitioner Debra King voluntarily terminated her parental rights to allow her mother to legally adopt her 10 year old daughter to maintain her child's stable and loving environment during her incarceration. Ms. King continued to parent her child, receiving regular visits with her mother and natural child. The new rules prohibit all future visits.

The rules prohibit any visitation between an incarcerated parent and their child who resides with an adult who maintains full power of attorney to exercise parental authority on her behalf. If the adult is not a full legal guardian nor an immediate family member as defined by prison authorities, but rather the caretaker designated by the parent, the child is not allowed to visit.

The named Petitioners' circumstances are not unusual,

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parent" to their own nieces or nephews. (App. 57, R 791.6609(a)).

rather are reflective of the situation of many children of incarcerated parents. The majority of incarcerated prisoners are parents and the vast majority of women prisoners are the sole custodians of their children at the time of their incarceration. Upon incarceration, children are often placed with family members who do not meet the Michigan prison authorities' definition of what shall constitute an "immediate family" member but rather are reflective of both socioeconomic and cultural backgrounds in which extended families constitute the norm. Most women prisoners lack the financial resources necessary to establish legal guardianship with the caretakers of their children and the district court took judicial notice both of the fact that the parent Petitioners rarely have an opportunity to establish legal guardianships prior to incarceration and that conferring such a status on a caretaker endangers the parental rights of incarcerated parents by making them vulnerable to a termination petition.

B. Proceedings Below

The Petitioner class, compromised of both non-prisoners and prisoners, filed suit on August 23, 1995 alleging *inter alia* that the regulations' blanket prohibitions on visitation impermissibly impinged upon prisoners and their families' First and Fourteenth Amendment rights to association. Petitioners obtained a temporary restraining order prohibiting the implementation of these restrictions until resolution of the preliminary injunction motion.

At the preliminary injunction hearing it was undisputed that loss of visitation between children and their parental figures, beyond the obvious separation trauma resulting from incarceration would result in severe or permanent impairment of the Petitioners children. The emotional toll from feelings of abandonment and the loss of the emotional attachment and the impact on the children was undisputed.

The prohibition on family visitation and on visitation by community workers, including domestic violence volunteers, substance abuse counselors, mental health workers and members of prisoner assistance groups was acknowledged to have a detrimental effect on rehabilitative goals and on prisoners' reintegration into the community upon release.

Defendants presented three fluid arguments as to the penological objectives behind these restrictions. Defendants initially asserted that the restrictions were to control the volume of visits within Michigan's prisons.

Yet prison authorities were unaware of the number of minors visiting Michigan prisons and unaware of how the rules would impact volume. Prison authorities could not articulate why they simply did not further reduce the number of allowable visits as opposed to prohibiting certain categories of visitors. Defendants then articulated the rationales of preventing the introduction of contraband and protecting children from harm in the visiting rooms as their objectives. (App. at 49).

There was no assertion that any of the restricted categories of visitors had been an instrument for introduction of contraband or that children were more likely than other permitted visitors to bring in contraband despite the district court directly seeking this information at the preliminary injunction hearing.

> It would be interesting to have some proof that the categories of people being excluded are the people through whom, you know, contraband or weapons even occasionally come in, and, you know with Ms. Burke's vast experience, she hasn't had a single incident that she can point to of a child bringing it in.

Further, prison officials never identified how prohibition

of non-contact visits could be related to a prevention of the introduction of contraband.

The final "penological" interest articulated, was to prevent harm to children.

During the preliminary injunction proceedings, when the parties attempted to explore Defendants' assertion of harm to children because children might see improper things in visiting rooms, the district court curtailed the inquiry stating:

> But don't spend your time telling me that kids are, you know, that kids might get hurt in the waiting room or that they are exposed to bad words or that, you know, there are incidents of somebody fondling someone and they are going to see that. It's just not going to impress me.

In cross examining Bolden on his testimony that sexual misconducts occur in the visiting room and children could see them, the court again precluded an inquiry as to whether the sexual misconduct was simply a prohibited hug or a kiss between a husband and wife stating, "Well I'm not really interested in going through that exercise."

Defendants did not articulate how a concern for children's welfare was rationally related to regulations that allowed some children in but prohibited other children or how it related to prohibition of non-contact visits as well as contact. With regard to other harm to children, Defendants presented one incident where a child was abused in a visiting room but readily acknowledged that had prison authorities enforced visiting rules, the incident would have been prevented.

At the close of the hearing, the district court in evaluating the four factors necessary to decide whether to issue a preliminary injunction ruled that:

> Even assuming that the court would find that the

> Plaintiffs have met their burden as to [irreparable injury, balance of harms and public interest], since the Plaintiffs' cannot show that a 'serious question' as to the merits exists, this court cannot find in their favor.

(App. at 51)

The district court declined to perform a *Turner* analysis upon determining that the rules did not impinge constitutional rights.

After the court issued the denial of a preliminary injunction, Plaintiffs filed an appeal and Defendants, in lieu of filing an answer to Plaintiffs' Complaint, filed a Motion for Summary Disposition/Summary Judgment relying upon the district court's Opinion denying preliminary injunction as the sole basis for dismissal. Defendants did not present any affidavits nor testimony in support of their motion. Plaintiffs opposed the motion arguing that they had stated a cause of action, there were material facts in dispute and discovery had not yet occurred.[3]

The district court, relying solely upon the preliminary injunction record, dismissed Petitioners' suit reiterating the absence of any constitutional right of association for prisoners and non-prisoners and concluding in summary fashion that Plaintiffs failed to meet their burden to demonstrate that Defendants' rules did not address legitimate state interests or that Defendants' regulations were an exaggerated response to such interests. Plaintiffs appealed and the issue was consolidated with the pending appeal of the denial of preliminary injunctive relief.

C. Circuit Review

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[3]The district court had not scheduled the prerequisite discovery status conference pursuant to Fed. R. Civ. P., Rule 26.

On appeal the Sixth Circuit affirmed the district court's grant of summary judgment and in so doing ruled that Plaintiffs' appeal of the denial of preliminary injunctive relief was moot. (App. at 8).

The Sixth Circuit's reference to the visitation restrictions applying only to restrict contact visits, necessitated a motion for rehearing to clarify that the rules, as written and subsequently implemented, prohibited both contact *and* non-contact visits for the Petitioners. Both parties agreed in their filings to the Sixth Circuit that the regulation prohibited all visitation from minors and community workers, except for the child, step-child and grandchild exception.[4]

The Sixth Circuit issued a Supplementary Opinion reiterating its belief that the rules applied only to restrictions on contact visits and that the alternative of non-contact visits survived and affirmed the district court's dismissal of Petitioners' challenge to the regulation. Petitioners' Motion for Rehearing and Suggestion for Rehearing En Banc was denied. (App. 1).

REASONS FOR GRANTING THE WRIT

The Sixth Circuit has diminished the rights of community members and prisoners in the fundamental constitutional area of family relationships by affirming that neither prisoners nor their family members possess First Amendment rights of association and therefore let stand categorical prohibitions on all forms of visitation. The Sixth Circuit reached this holding by finding that this Court's requirements for review

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[4]Although the parties sought different relief. Defendants urged that the Sixth Circuit's analysis could be extended to approve the restrictions on both contact and non-contact visits. Plaintiffs requested a remand to further develop the factual record or a rehearing to allow the appellate court to correct its misapprehension on the extent of the restrictions.

of prison regulations that impinge on constitutional rights set forth in *Turner v. Safely*, 482 U.S. 78 (1987), are essentially questions of law not requiring a factual inquiry to resolve. The Sixth Circuit further held that to the extent facts were relevant, the deference to be accorded prison authorities did not allow application of the presumptions required by Rule 56 in deciding whether to grant summary judgment. The Sixth Circuit's allowance of prohibitions on visitation between prisoners and families goes beyond any prior interference with family association approved by this Court and applies to all prisoners and communities within the Sixth Circuit's jurisdiction.

Further, the Sixth Circuit's holding with regard to both the *Turner* standard and the deference afforded prison authorities is representative of the disturbing direction being taken by lower courts in this area, requiring affirmation of the meaning of the *Turner* standards.

I. BOTH THE DISTRICT COURT AND THE APPEALS COURT BELOW ERRED AS A MATTER OF LAW IN FINDING THAT THERE IS NO CONSTITUTIONAL ASSOCIATIONAL RIGHT TO VISITATION WITH FAMILY MEMBERS.

As previously described, the Michigan Department of Corrections' visitation policies preclude any visits between prisoners and various family members. The policies further preclude visitation by community workers and volunteers. The district court below held that the Sixth Circuit had not yet found that a First Amendment right of association in the context of prison visits. (App. at 29). *See Long v. Norris*, 929 F.2d 1111, 1118 (6th Cir.), *cert. den.* 502 U.S. 863 (1991). The lower court then concluded, "A survey of case law from other circuits leads this court to find that the

greater weight of authority holds that no First Amendment right of freedom of association exists for prisoners." (App. at 29). The district court also found no associational rights exist for non-prisoners in the visitation context. The district court opined, "As stated by the Supreme Court, the inaccessibility of a prisoner to his family does not deprive an inmate of a liberty interest protected by the Due Process Clause in and of itself." (Citing *Olim v. Wakinekona*, 461 U.s. 238 (1983). (App. at 33). The appellate court left the ruling below intact, affirming the opinion below and left *Long v. Norris, supra* as the law in that circuit.

A. Family Associational Rights

The Michigan prison policies totally preclude visitation within families: minor siblings; children in the designated care of another where the inmate retains all parental rights; children of voluntary open adoptions with visitation agreements; cousins; nephews and nieces are all prohibited from visitation with incarcerated parents and family members. These same policies permit visits with non-family members, some minor children and certain other family members deemed sufficiently "immediate" by prison authorities.

This Court has historically and currently acknowledged the highest value in the fundamental right to parenting. *See, M.L.B. v. S.L.J.*, 117 S.Ct. 555 (1996); *Gluksberg v. Washington*, 117 S.Ct. 2258, 2267 (1997) (citing *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Santosky v. Kramer*, 455 U.S. 745 (1982); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Levy v. Louisiana*, 391 U.S. 68 (1978). As Justice Souter recently opined, this right among others, such as marriage (*Turner*) and religion (*O'Lone*), are not lost to all family members

simply because one member may be incarcerated. *Lewis v. Casey*, 116 S.Ct. 2174, 2205 (1996) (Justice Souter concurring and dissenting). This Court has never addressed the family integrity rights of association in the visitation context with post-trial, long-term incarcerations. When addressing family relationship rights of prisoners, this Court specifically found marriage to be a fundamental right of prisoners, especially in relationship to non-prisoners, and struck down a ban on such marriages. *Turner v. Safely*, *supra*. Certainly, parental rights of **already** established families, are equally sacroscent.

Some visitation with family of an inmate, as in this case, has been found to be a protected interest under the Constitution. *See Valentine v. Englehardt*, 474 F. Supp. 294 (D. New Jersey, 1979); *Navin v. Iowa*, 843 F. Supp. 500, 502 (N.D. Iowa 1994)(both inmate-parent and child have First Amendment associational/family rights); *Stewart v. Gates*, 450 F. Supp. 583, 586 (C.D. Cal. 1978); *Boudin v. Thomas*, 533 F. Supp. 786 (S.D.N.Y. 1982); *Massey v. Wilson*, 484 F. Supp. 1332 (D. Colo. 1980); *Buie v. Jones*, 717 F.2d 925 (4th Cir. 1983)(an absolute prohibition of visits between inmate and child is "almost certainly unconstitutional.") *See also, Jones v. Diamond*, 636 F.2d 1364, 1376 (5th Cir. *en banc* 1981).[5]

The courts have recognized a constitutional First or Fourteenth Amendment family associational right between siblings. *See Aristotle P v. Johnson*, 721 F. Supp. 1002 (N.D. Ill. 1989); *Mayo v. Lane*, 867 F.2d 374, 375 (7th Cir. 1989); *See Gen. Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 545 (1987); *Bell v. City of Milwaukee*, 746 F.2d 1205, 1247 (7th Cir. 1984);

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[5]The court in *Block v. Rutherford*, 468 U.S. 576 (1983), recently noted the very short term impact of a denial of contact visits, "*at most* a few days or weeks. . . " *Id.* at 578 (emphasis added).

Philadelphia Police and Fire Assoc. for Handicapped Children, Inc. v. City of Philadelphia, 874 F.2d 156, 165 (3rd Cir. 1989); *Robinson v. Palmer*, 619 F. Supp. 344, 347 n. 6 (D.D.C. 1985); *Smith v. McDonald*, 869 F. Supp. 918, 919 (D. Kansas 1994) ("[T]he court would carefully scrutinize a policy which created a blanket prohibition on visitation by minors."); *McMurey v. Phelps*, 533 F. Supp. 742, 764-65 (W.D. La. 1982), *overruled on other grounds*, *Thorne v. Jones*, 765 F.2d 1270 (5th Cir. 1985).

In other areas of fundamental rights which require visitation, contact and association to implement, this Court and the circuits have found state preclusions to violate the Constitutional protections under the Sixth, Eighth and Fourteenth Amendments. *See Procunier v. Martinez*, 416 U.S. 396 (1974) (right of prisoners to meet with paralegals and law students employed by their attorneys); *Johnson v. Avery*, 393 U.S. 483 (1969) (between inmates to maintain access to the courts); *Dreher v. Sielaff*, 636 F.2d 1141 (7th Cir. 1980); *Ching v. Lewis*, 895 F.2d 608, 609 (9th Cir. 1990) (right to contact visits with attorneys); *Buehl v. Lehman*, 802 F. Supp. 1266, 1270 (E.D. Pa. 1992) ("for example, a perfectly valid general visitation policy may not necessarily be employed to bar a visit by counsel or legal personnel if this would unduly impair an inmate's Sixth Amendment rights"); *Smith v. Couglin*, 748 F.2d 783, 789 (2nd Cir. 1984); *Barnett v. Centoni*, 31 F.3d 813, 816 (9th Cir. 1994); *Whitney v. Brown*, 882 F.2d 1068 (6th Cir. 1989)(First Amendment association); *Cole v. Rahija*, 114 F.3d 778 (8th Cir. 1997) (right to have medical care outside the prison, despite security risks if medically necessary); *Monmouth County Correctional Institutional Inmates v. Lanzaro*, 834 F.2d 326 (3rd Cir. 1987) (access to abortion services outside the jail); *Sappington v. Ulrich*, 868 F. Supp. 194 (E.D. Tex. 1994)(medical care outside the prison).

The district court found that there are no fundamental

family rights were at issue, despite the explicit language and impact of the state regulations. (App. at 30-33). The district court's dismissed the claim, as a matter of law, distinguishing *Moore, supra*, as it concerned families who were not impacted by prison regulations and limited to grandparent/grandchild relationships. (App. at 30-33). The district court further opined that as incarceration itself interfered with family relationships, any further restrictions could not be viewed as impinging on any surviving constitutional rights. (App. at 31). The Sixth Circuit affirmed this decision without even addressing these constitutional questions.

The constitutional rights of family members who are not prisoners was given equally short shrift by both the district court and the court of appeals below despite this Court's admonition that careful scrutiny must be applied when the fundamental rights of non-prisoners are restricted. *See Turner*, 482 U.S. at 96.

Allowing the Sixth Circuit decision to stand results in a standard of law for the Sixth Circuit which is inconsistent with other federal courts and ignores this Court's rulings on the importance of family integrity and association. Certainly, it cannot be the law that visitation is permitted between inmates and paralegals, as a matter of constitutional law, but is totally precluded between close family members.

II. THE SIXTH CIRCUIT HAS ABROGATED THE STANDARDS AND FACTUAL REVIEW REQUIREMENTS OF *TURNER v SAFELY* FINDING THE STANDARD TO BE ONE OF LAW AND MISINTERPRETING THIS COURT'S POLICY OF DEFERENCE TO FIND THAT THE FACTUAL PRESUMPTIONS REQUIRED BY THE RULE AND LAW OF SUMMARY JUDGMENT DO NOT APPLY TO

THE RULING AND CONFLICTS WITH THIS COURT AND DECISIONS OF OTHER FEDERAL COURTS ON THE *TURNER* STANDARD OF REVIEW.

In reviewing the district court's application of the standards of *Turner v Safely*, the Sixth Circuit below held, as part of its ruling on questions of law, that:

> The important word, one that appears specifically or by implication in all pertinent Supreme Court opinions, is 'deference.'
>
> Appellants attempt to avoid the concept of deference by arguing that, because the district court proceeded by grant of summary judgment, it should have construed the evidence in the light most favorable to them. Indeed, because appellees moved for summary judgment before filing their answer, appellants contend that every allegation in their complaint should have been accepted as true. We are not persuaded. Utilization of these summary judgment concepts would not be an act of deference. It would, instead, be a usurpation of the original decision-making process which the Supreme Court has placed in the hands of the prison officials.
>
> The issue in the instant case was basically one of law . . .

(App. at 17).

This ruling takes the policy considerations of "deference" and extends the carefully drafted standards for factual analysis of this Court under *Turner v Safely*, Fed. R. Civ. P. Rule 56 and this Court's interpretation of this Rule in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), as well as the

essential role of the federal courts in constitutional adjudication to an absurdity.

While some courts have taken the *Turner* analysis to a point of virtual meaninglessness in reviewing fundamental constitutional rights, the Sixth Circuit pushes the "deference" policy to an extreme not yet visited by any other federal court. Further, this Sixth Circuit's decision reinforces the disturbing propensity of some lower courts and other circuits' use of the "deference" policy to avoid following the careful test enunciated in *Turner*.

In *Turner*, this Court carefully reviewed the factual record below, developed after trial, using a carefully drafted four part standards for factual review. *Turner* at 482 U.S. at 92. After a careful, *de novo* review of the facts, this Court concluded that the state's ban on the fundamental right to marriage between prisoners and non-prisoners violates the fundamental right to marriage. *Id.* at 99. There is absolutely nothing in this Court's ruling to support the Sixth Circuit's finding that the Federal Rules of Civil Procedure are suspended in prison cases raising constitutional questions. If anything, the *Turner* court was careful to delineate what factual review means under its new "reasonableness" test.

As discussed, *infra*, Petitioners here not permitted to develop a record, engage in discovery nor have the standards and presumptions apply to their constitutional claims.

In invoking the *Turner* standards of factual review, other circuits have clearly stated that the review is factual and neither Rule 56, nor any other federal procedural rules, are suspended simply because the constitutional challenge is to prison regulations:

> We review the district court's grant of summary judgment *de novo*, *United States ex rel Glass v. Medtronic, Inc.* . . . We must decide whether the record shows that there is no genuine issue

> as to any material fact and whether the moving party is entitled to judgment as matter of law.

Weiler v. Purkett, 46 F.3d 1137 (8th Cir. 1995) (reversing and remanding a district ruling granting summary judgment on a claim that a prison regulation violated the First and Fourteenth Amendment).

The Seventh Circuit has similarly held:

> We review the district court's grant of summary judgment *de novo, construing the evidence in the light most favorable to Bryant-El and Hinton-Bey and according them the benefit of all reasonable inferences.*

Bryant-EL v. Smith, 46 F.3d 1133, 1995 U.S. App. LEXIS 6887 (7th Cir. 1995) (citing Rule 56, applying *Turner v. Safley*, and reversing the district court granting summary judgment to prison officials when a First Amendment issue was raised).

The Second Circuit, in reviewing a grant of summary judgment under a *Turner v. Safely* analysis similarly found: "To prevail on a motion for summary judgment, the moving party must show that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law." (citing *Celotex* and Rule 56) and *Giant v. Senkowski*, 54 F.3d 1050 (2nd Cir. 1995); *See also, Ashelman v. Wawrzaszek*, 111 F.3d 674 (9th Cir. 1997); *Ching v. Lewis*, 895 F.2d 608 (9th Cir. 1989); *Buehl v. Lehman*, 802 F. Supp. 1266, 171 (E.D. Pa. 1992).

Other circuits, unlike the Sixth Circuit below, circuits have found that, "The reasonableness inquiry of *Turner* is a mixed question of law and fact." *Iron Eyes v. Henry*, 907 F.2d 810, 813 (8th Cir. 1990); *Mosier v. Maynard*, 937 F.2d 1521, 1525 (10th Cir. 1991); *Hall v. Bellmon*, 935 F.2d

1106, 1113 (10th Cir. 1991); *Friedman v. State of Arizona*, 912 F.2d 328, 331 (9th Cir. 1990); *Howard v. United States of America*, 864 F. Supp. 1019, 1024 (D. Colo. 1994).

Still other courts have degraded the *Turner* inquiry to little more than a rate inquiry as to whether prison officials can articulate any plausible explanation for their impingement on constitutional rights. *See e.g., Dei, The New Standard of Review for Prisoners Rights: A Turner For The Worse?, 33 Villino L.Rev. 383 (1998)* (proposed a middle ground analysis for total abridgment of constitutional rights and suggested by the Second Circuit in *Abdul Wali v. Coughlin*, 754 F.2d 1015 (2nd Cir. 1985). Another panel of the Sixth Circuit eloquently stated the risks of improperly taking the policy of "deference" too far:

> Perhaps the greatest weakness in the prison officials' arguments is their misunderstanding of *Turner* and *O'Lone* as holding that federal courts will uphold prison policies which can somehow be supported with a flurry of disconnected and self-conflicting points. They seem to read *Turner* and *O'Lone* as saying that anything prison officials can justify is valid because they have somehow justified it. In an argument typical of their conclusory approach to the problem, the prison officials maintain that the Passover Seders should be banned because 'any time the normal routine of an institution is altered, the good order and security of that facility are potentially compromised.' Prison officials' Brief at p. 8. The fact remains, however, that prison officials do not set constitutional standards by fiat.

Whitney v. Brown, 882 F.2d 1068, 1073 (6th Cir. 1989); *See*

also, Washington v. Harper, 494 U.S. 210, 235 (Justice Stevens, concurring/dissenting).

All the *Turner* factors must be fully reviewed under the required standards. *See Mann v. Reynolds*, 46 F.2d 1055, 1058-61 (10th Cir. 1995); *Bedford v. Sharp*, 120 F.3d 270 (10th Cir. 1997); *Weiler, supra*.

Courts must be required to actually apply the *Turner* analysis or the fears reflected by Justice Stevens will be realized *Turner* at 99.

In light of a disturbing trend in the misapplication and pattern of ignoring the *Turner* standards of review, and the extreme extension of *Turner* by the Court below in finding the *Turner* analysis is simply a legal issue which does not require full fact finding and development below and that the requirements of Rule 56 do not apply to constitutional claims involving prisoners, this Court should reiterate and clarify the efficacy of its decision in *Turner*.

> The analysis must begin with the right being circumscribed. Otherwise, a regulation validly circumscribing one right, or even a mere privilege, may be employed to impair other, perhaps more fundamental rights incidently effected by that regulation but not contemplated with its adoption and as to which application of the *Turner* factors might result in a very different calculus.

Buehl v. Lehman, supra at 1270.

The district court declined, however, to analyze the challenged prison regulations under *Turner*, finding there to be an insufficient impingement on the constitutional rights of the Petitioners to warrant an inquiry, with one exception. However, the court's initial decision was improper.

III. THE CIRCUIT COURT ERRED IN AFFIRMING THE DISTRICT COURT WHERE THE COURT FAILED TO PERFORM AN ADEQUATE INQUIRY AS REQUIRED BY *TURNER*.

A. The Court Failed to Determine Whether the Regulations Were Reasonably Related to Legitimate Penological Objectives.

> [A]ny burden placed upon a prisoners' constitutional rights requires the federal court to take the next step to determine whether it is 'reasonably related' to legitimate penological objectives, or whether it represents a 'exaggerated response' to those concerns. 482 U.S. at 86.

Mann v. Reynolds, 46 F.3d 1055, 1059 (10th Cir. 1995).

The district court ignored this mandate with one exception. With regard to the regulation that a child be accompanied by an approved "immediate family member" or full legal guardian in order to visit with an incarcerated parent, the district court did identify but failed to analyze the regulations pursuant to the four factors set forth in *Turner*. (App. at 33).

Turner requires an inquiry "after an independent review of the evidence" of whether the challenged regulation is an exaggerated response to prison concerns. *Turner, supra*, at 90-91; *See also*, *Salaam v. Lockhart*, 905 F.2d 1168, 1171 (8th Cir. 1990), *cert den.* 498 U.S. 1026 (1991). Consideration of whether a regulation is an exaggerated response includes an inquiry as to the existence of alternatives, *Washington v. Harper*, 494 U.S. 210, 225 (1990) (whether there is any inconsistency in the application of the regulation); *Weiler v. Purkett*, 46 F.3d 1137 (8th Cir.

1995); *Thornburgh v. Abbott, supra* at 417 n. 15.; *Ward v. Walsh*, 1 F.3d 873 (9th Cir. 1993), *cert. den.* 510 U.S. 1192 (1994).

The district court noted that Defendants had articulated that family members and guardians are best suited to controlling children citing the testimony of Bolden. The referenced testimony simply did not support this finding. The testimony related to the opinion of Bolden that children will be more protected "when a child is there visiting their parent." The testimony had nothing to do with the regulation requiring who can bring a child to visit their parent. (App. at 34). The district court noted no other articulation of a penological goal for this regulation which the court acknowledged could preclude over 50 percent of the visitation between children and their incarcerated parents.

The Sixth Circuit further adopted the protection of children as a recognized penological interest to support all of the challenged regulations with regard to minors. However,

> [I]t simply does not lie with jail officials to determine what is in the best interest of the inmates' children. The jail officials have taken it upon themselves to deny all these individuals who are incarcerated for whatever reason and their children one of the most fundamental of all human rights. The rule forbidding incarcerated parents from seeing their children is not only arbitrary, it is an exaggerated response to a concern which does not properly rest with jail authorities.

Valentine v. Englehardt, 474 F. Supp. 294, 302 (D. N.J. 1979).

Nor was there any recognition of the obvious lack of rationale relationship between the goal of protecting children

and a regulation that prohibits only certain minors from visiting their family members. Even assuming Defendants' concerns can be valid penological goals, there exists alternatives available to the prison authorities that would have preserved the Petitioners' constitutional rights.

With regard to the regulation requiring an immediate family member or a legal guardian to bring a child for a visit, the concern was that an appropriate adult be present to protect a child in the visiting room. The court in *Stewart v. Gates*, 540 F. Supp. 583 (C.D. Cal. 1978), noted:

> It is understandable that the defendants are reluctant to receive unaccompanied minors as visitors at the jail. On the other hand a prisoner may have teenage children that are fully capable of coming alone and who otherwise would be unable to visit their parent. Accordingly, inmates should be permitted, upon prior request, to receive unaccompanied visits from their minor child.

For minors under 16, the prison authorities could adhere to state practices which allow the transfer of parental rights by a power of attorney. This would allow in the parent, who has the authority to determine what is in the best interest of the child to designate an appropriate adult, and provide a mechanism for the prison authorities to ascertain that the adult had the requisite authority to supervise the child.

With regard to the concern over children being exposed to inappropriate behavior in a visiting room, enforcement of the policies against such inappropriate behavior of others would resolve this matter. Alternatively, a separate visitation

time for children could be created.[6]

Where prison authorities acknowledge that the majority of contraband is brought in by adults, where prison authorities pose no restrictions on adults other than only 10 adults outside of immediate family members may be listed on an approved visitor list, the prohibition of any minor children from entering the prison based on a concern for introduction of contraband is an exaggerated response to this concern. Further, the adults are allowed full contact visits, in the absence of any misconduct by the visitors in attempting to introduce contraband. In such case, the visitor may be restricted to non-contact visits for a period of time. This rationale does not support a full prohibition on visits both contact and non-contact with minors.

Defendants' prohibition on visits between birth mothers and their children if there has been a termination of the parental rights had no articulated rationale. Even assuming that prison authorities wish to prevent such visits under a belief that it was not in the best interests of the child, prison authorities could require that child to be brought by the adoptive parent, who presumably has at least as much interest in their child as prison authorities. Further, if the concern was for an involuntary termination of parental rights, the rule could be restricted to prohibition of visits where rights were involuntarily terminated in the absence of a court order finding visitation appropriate.

Had Petitioners had the opportunity to develop the record, the obvious alternatives and their potential costs to the prison authorities could have been explored allowing the court to make an appropriate *Turner* analysis.

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[6] Petitioners believe an adequately developed record would further demonstrate that there is less harm to a minor child in the potential of viewing inappropriate behavior in the visiting room than being prohibited from visitation with their sibling or parent.

However, in this instance, where the record did not allow for a full analysis of the alternatives, summary judgment was improper. *Ward v. Walsh*, 1 F.3d 873 (9th Cir. 1993), *cert. den.* 510 U.S. 1192 (1994).

The Sixth Circuit's belief that the restrictions only applied to contact visits further demonstrate the error in the granting of summary judgment without development of the factual record. The record clearly is not adequate to perform a *Turner* inquiry where the extend of the visitation restrictions on minors remained unclear. *Boudin v. Thomas*, 533 F. Supp. 786 (S.D. NY 1982) (deprivation of contact visits with child is an unreasonable exaggerated response). *Rhem v. Malcom*, 371 F. Supp. 594 (S.D. NY 1994); *Berch v. Stahl*, 373 F. Supp. 412 (W.D. NC 1974) (the state cannot restrict the right to communicate directly with loved ones short of a demonstration of compelling interests since the hope of rehabilitation depends at least in part on the maintenance of affirmative social relationships).

B. The Preliminary Injunction Record Was Inadequate for Purposes of a Full Inquiry.

The district court's failure to allow meaningful discovery prior to deciding the summary judgment motion, resulted in an inadequate record for the court to decide these questions of constitutional law requiring the specific factual analysis under *Turner*. While this Court has not specifically addressed the issue in the context of a *Turner* analysis, this Court has cautioned against granting summary judgment under analogous circumstances. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159 (1970) (where evidence presented in support of motion does not establish the absence of a genuine issue, summary judgment must be denied); *White Motor Co. v. United States*, 372 U.S. 253 (1963) (summary judgment is not appropriate where motive and intent play leading roles);

Anderson v. Liberty Lobby, 477 U.S. 242 (1986) (summary judgment should be refused where the non-moving party has not had an opportunity to discover information essential to his opposition).

Despite the acknowledgement that this case presented constitutional issues that had not yet been resolved by the Sixth Circuit or this Court, and where a central disputed issue was the motivation and rationality of Defendants' policies, the court's grant of summary judgment without allowing adequate opportunity for discovery was an abuse of discretion. (App. at 45-46).

The district court granted summary judgment based solely on the testimony presented in the context of a preliminary injunction hearing. Where the inquiry is different than a summary judgment proceeding:

> The purpose of a preliminary injunction is merely to preserve the relative positions of the party until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. A party thus is not required to prove his case in full at a preliminary injunction hearing.

University of Texas v. Camenisch, 451 U.S. 390, 395 (1981) (reliance upon preliminary injunction finding as a basis for granting summary judgment improper).

The district court argued that while it could not grant summary judgment merely on the basis that preliminary injunction was denied because of lack of likelihood of success on the merits, however, the court could grant

summary judgment relying upon the preliminary injunction record to determine whether a genuine of material fact exists. (App. at 27-28). Whether or not the district court issued a separate opinion based upon the same findings and rulings in the opinion denying preliminary injunction or not is not the issue. The point is that the burden on the parties and inquiry at issue in a preliminary injunction hearing are not interchangeable with the burden and inquiries relevant to a summary judgment review. The inquiry at a preliminary injunction hearing is focused on the threat of irreparable harm to the Plaintiffs if the injunction is not granted; whether on balance that harm outweighs the harm to opposing party if a stay is granted; the harm, if any, to the public interest if an injunction issues; and the strength of the applicant's demonstration that they are likely to prevail on the merits. *Local Union 1937 v. Norfolk Southern Corp.*, 927 F.2d 900, 903 (6th Cir. 1991), *cert. den.* ___ U.S. ___ (1991).

The facts presented in the context of a preliminary injunction hearing for purposes of the court balancing the above four factors, differ significantly from the summary judgment inquiry of whether there existed genuine factual dispute. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The district court did not allow Plaintiffs to develop the record to demonstrate a factual dispute as to the articulated criteria set forth under *Turner v. Safely*, prior to granting summary judgment. The evidence of alternatives available to the Defendants to the challenged regulations which impinge Petitioners' constitutional rights, and evidence relating to Defendants' exaggerated response to a perceived problem, was likely to be in the possession of the Defendants and Plaintiffs should have been provided the opportunity to conduct discovery on this issue which was not a salient inquiry in the preliminary injunction hearing, where the rules had not yet been implemented. *Anderson v. Liberty Lobby*, supra, at 249-250; *Bromley v. Michigan Education*

Association - NEA, 82 F.3d 686 (6th Cir. 1996) (summary judgment in constitutional cases should follow meaningful discovery, and reliance solely upon an arbitration record was improper); *Routman v. Automatic Data Processing, Inc.*, 873 F.2d 970, 971 (6th Cir. 1989) (the notice requirements for summary judgment include sufficient time for discovery).

IV. THE CIRCUIT COURT ERRED IN APPLYING A LOWER SCRUTINY TEST TO REVIEW PETITIONERS' EQUAL PROTECTION CLAIM ON BEHALF OF MINOR SIBLINGS OF PRISONERS.

The district court *sua sponte* dismissed Plaintiffs' equal protection claim on behalf of the minor siblings and children of prisoners asserting that a fundamental right was not at issue and that Defendants' had "articulated legitimate state interests." The court found the prison authorities' mere articulation of a desire to protect the minor children of prisoners to satisfy the rational basis test applied by the district court to dispose of this claim. (App. at 37-38). The Sixth Circuit relied upon *Thornburgh v. Abbott*, 490 U.S. 401 (1989) to conclude that if the prison regulations do not violate prisoners' constitutional rights, the effect on prisoners' children and family members is irrelevant. (App. at 19).

Where the penological interest alleged is the protection of non-prisoners, not internal prison security concerns, the lower scrutiny afforded constitutional impingement on prisoners' rights is improper. Further, this analysis does not apply to Petitioners' claim of equal protection violations for prison authorities' discrimination between groups of non-prisoner visitors.

The prison authorities' only other articulated interest, prevention of introduction of contraband, is unrelated to

Defendants' prohibition of some minor family members where: 1) Defendants allow full contact visits with adult visitors and other minor children; 2) there is no allegation that contraband was ever introduced through the categories of prohibited minor sibling visitors; and 3) introduction of contraband is not a concern for non-contact visits which are also prohibited.

Rather than allow a circuit decision to stand which asserts that *Abbott* requires that the constitutional rights of non-prisoners are never to be analyzed separately from prisoners in challenging prison regulations, this Court should clarify that in circumstances where the fundamental rights of non-prisoners are at issue and the articulated governmental concern is with protection of non-prisoners' safety, a closer relationship between the regulation and the purpose it serves is required. *Thornburgh v. Abbott, supra* at 412; *See also Blackburn v. Snow*, 771 F.2d 556 (1st Cir. 1985); *Daugherty v. Campbell*, 33 F.3d 554 (6th Cir. 1994).

CONCLUSION

Petitioners urge this Court to grant certiorari for purposes of clarifying the appropriate standard for analyzing restrictions on the Petitioners' First Amendment rights to association and Fourteenth Amendment rights to family integrity in the context of visitation between prisoners and their families and to remand this matter for development of

a factual record adequate for implementing this standard.

Respectfully submitted,

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DATED: May 4, 1998

No.95-2181

MICHELLE BAZZETTA; ET AL,	)	Filed
	)	Feb. 02 1998
Plaintiffs-Appellants	)	
	)	Order
v.	)	
	)	
KENNETH McGINNIS, DIRECTOR, MICHIGAN DEPARTMENT OF CORRECTIONS, ET AL,	)	
	)	
Defendants-Appellants.	)	

Before: SILER, COLE, and VAN GRAAFEILAND,[1] Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the

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*The Honorable Ellsworth A. Van Graafeiland, Circuit Judge of the United States Court of Appeals for the Second Circuit, sitting by designation.

case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green /s/
Leonard Green, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHELLE BAZZETTA; STACY BARKER; TONI BUNTON; DEBRA KING; SHANTE ALLEN; ADRIENNE BRONAUGH; ALESIA BUTLER; TAMARA PRUDE; SUSAN FAIR; VALERIE BUNTON; ARTURO ZAVALA, through his Next Friend VALERIE BUNTON, on behalf of themselves and all others similarly situated,
Plaintiffs-Appellants

Nos. 95-2181
96-1559

v.

KENNETH McGINNIS, Director of Michigan Department of Corrections, MICHIGAN DEPARTMENT OF CORRECTIONS,
Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit,
No. 95-73540--Nancy G. Edmunds, District Judge

Argued: February 4, 1997

Decided and Filed January 5, 1998

Before: SILER, COLE, and VAN GRAAFEILAND*, Circuit Judges.

SUPPLEMENTARY OPINION

VAN GRAAFEILAND, Circuit Judge. On September 4, 1997, this Court affirmed certain limitations on prisoner visitation imposed by the district court. *See* 124 F.3d 774. Because the Michigan Department of Corrections construes our opinion in a manner that was not intended, this Supplementary Opinion is written solely for the purpose of clarification.

The Department's brief on appeal contains the following clearly expressed and significantly emphasized statement:

> It is important to note that the visitation restrictions at issue involve limitations on *contact visitation* between members of the public, including minor children, and convicted felons.

There was nothing new or novel in this definition of the issue. The Department took the same position in the district court. In its response to the plaintiffs' motion for a preliminary injunction, it said:

> It is important to emphasize that the challenged visitation policies at issue in this case concern limitations on contact visitation. Since contact visitation involves personal, face-to-face contact by convicted/incarcerated

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*The Honorable Ellsworth A. Van Graafeiland, Circuit Judge of the United States Court of Appeals for the Second Circuit, sitting by designation.

felons with members of the public, the sheer volume of visitations alone (2300 contact visits each day, averaging 69,000 visits each month, for about 820,000 visits annually) must be restricted for reasons of security and administrative concerns related to maintaining internal order and discipline throughout all MDOC prison facilities. There can be no dispute that 820,000 visits annually presents a very difficult penological problem for MDOC with regard to the scheduling, screening, supervision and monitoring of contact visitation.

The Department continued:

Although MDOC is mindful of the close familial relationships that exist between a father and/or mother with their children, significant security and related administrative concerns caused by the high volume of contact visitation mandate a more narrow definition of the minor children (children, stepchildren and grandchildren) that are allowed contact visitation at MDOC facilities. Given MDOC's legitimate penological interest in maintaining order and security at its prison facilities and the real dangers involved whenever children participate in contact visits, these visitor restrictions are a reasonable response to important competing interests.

The evidence submitted by the Department was addressed to the issue of contact visitation, and this too was referred to in the above-mentioned response:

> As the attached affidavits of Deputy Director Bolden, Warden Burke and Warden Langley reveal, contact visitation between minor children and incarcerated felons presents a continuing problem for MDOC with regard to the security of its prison facilities and the

safety of the minor children at these facilities.

The Department's motion for summary judgment also addressed the issue as that of contact visitation:

> Limiting the number of minor children who are involved in contact visitation with incarcerated felons will enable MDOC to more closely monitor these visits to insure that no abuse or smuggling occurs as a result of contact visitation.
>
> . . . .
>
> . . . Plaintiffs also argue that the visitor restrictions are unconstitutional because the restrictions limit the right of members of the public to visit incarcerated felons. However, because members of the public have alternate methods to communicate with incarcerated felons, restrictions on contact visits between members of the public and inmates are not unconstitutional.

When the litigation moved to this Court, contact visitation was the obvious concern expounded in the Department's brief. At page 9 of its brief, the Department said "contact visits invite a host of security problems," and then proceeded to describe them. At page 13, the Department said that "because members of the public have alternate methods to communicate with incarcerated felons, restrictions on contact visits between members of the public and inmates are not unconstitutional." On page 14, it said that "limiting the number of minor children who are involved in contact visitation with incarcerated felons will enable MDOC to more closely monitor these visits to insure that no abuse or smuggling occurs as a result of contact visitation."

It is not surprising, therefore, that we held that "the visits at issue are 'contact visits,' i.e., visits that customarily take

place in a 'visitation room' or other area set aside for this purpose and permit innocent-only physical contact between prisoner and visitor." 124 F.3d at 775. However, counsel for the Department now inform the Court that the Court erred in accepting counsel's definition of the issue and "apologize for any misstatement in earlier briefs that may have led the Court to believe the rule changes apply only to contact visits."

Overlooking the fact that Rule 791.6614 bears the caption "Noncontact visitation," Department counsel contend that Rules 791.6607 to 791.6614 apply to both contact and non-contact visits, and they assert that "this Court's September 4, 1997 Opinion can easily be extended to both." The Department did not make this argument in either the district court or this Court. It cannot be made here and now. This opinion is intended simply to make that point clear.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Argued: February 4, 1997

Decided and Filed September 4, 1997.

Before: SILER, COLE, and VAN GRAAFEILAND*, Circuit Judges.

OPINION

VAN GRAAFEILAND, Circuit Judge. Plaintiffs, certified classes of Michigan prison inmates and prospective prison visitors, appeal the denial of their motion for a preliminary injunction and the dismissal of their *42 U.S.C. § 1983* challenge to State regulations restricting prison visitation rights. The visits at issue are "contact visits," i.e., visits that customarily take place in a "visitation room" or other area set aside for this purpose and permit innocent-only physical contact between prisoner and visitor. Non-contact visits, on the other hand, take place in small booths or cubicles, and no contact of any sort is permitted.

Michigan grades its prisoners on the basis of their dangerous propensities. The grades are numbered I through VI, and the most dangerous inmates are placed in either grade V or grade VI. With rare exceptions, contact visits are not permitted in either of these two grades, and this restriction is not at issue herein. The Supreme Court has said: "that there is a valid, rational connection between a ban on contact visits and internal security of a detention facility is too obvious to warrant extended discussion." *Block v. Rutherford*, 468 U.S. 576, 586, 82 L. Ed. 2d 438, 104 S. Ct. 3227 (1984).

In recent years, Michigan prison officials have attempted to accommodate to some extent the visitation desires of the more tractable prisoners in the lower grades and here they

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have run into problems. The *Block* Court's summary description of such problems is apt:

> Contact visits invite a host of security problems. They open the institution to the introduction of drugs, weapons, and other contraband. Visitors can easily conceal guns, knives, drugs, or other contraband in countless ways and pass them to an inmate unnoticed by even the most vigilant observers. And these items can readily be slipped from the clothing of an innocent child, or transferred by other visitors permitted close contact with inmates.

Id.

The Court also recognized the additional expense involved in the allowance of contact visitation:

> The reasonableness of petitioners' blanket prohibition is underscored by the costs--financial and otherwise--of the alternative response ordered by the District Court. Jail personnel, whom the District Court recognized are now free from the "complicated, expensive, and time-consuming processes" of interviewing, searching, and processing visitors would have to be reassigned to perform these tasks, perhaps requiring the hiring of additional personnel. Intrusive strip searches after contact visits would be necessary. Finally, as the District Court noted, at the very least, "modest" improvements of existing facilities would be required to accommodate a contact visitation program if the county did not purchase or build a new facility elsewhere. These are substantial costs that a facility's administrators might reasonably attempt to avoid.

Id. at 588 n.9 (citation omitted).

The instant litigation is a challenge to certain amendments

of the Michigan Administrative Code that were promulgated by the Michigan Department of Corrections in August 1995. Briefly summarized, they provide that a visitor under eighteen must be a prisoner's child, step-child or grandchild and must be accompanied by an immediate family member or legal guardian; that prisoners may not visit with their natural children if their parental rights have been terminated for any reason; that prisoners may have only ten non-family individuals on their approved visitors list; that general members of the public may be on only one prisoner's visitation list; that a former prisoner may visit a current prisoner only if the former prisoner is an immediate family member or a person with special qualifications such as a lawyer, clergyman or government representative.

The above amendments did not evolve out of thin air; they were the end result of careful and thorough consideration by prison officials. An understanding of the amendments the officials promulgated requires some knowledge of the problems they faced. An appropriate starting point is a description of what constitutes a contact visit. The reader who visualizes such a visit as a wholesome and exclusive family get-together without the usual travails of a penal institution must quickly disabuse himself of that notion.

The meetings are held in large rooms with numerous people in attendance. Luella Burke, the warden at Saginaw Correctional Facility, testified at the preliminary injunction hearing that the visitation area there could handle 133 visitors at one time. Sally Langley, the warden at Florence Crane women's facility in Coldwater, Michigan, testified that the visitation room there had a seating capacity of 45. Both wardens, and Daniel Bolden, Deputy Director for the Bureau of Correctional Facilities, the State's third witness, testified that these rooms were not "nice places" for children. When asked to elaborate, he said:

> Conduct of other visitors is the primary concern in terms of sexual behavior. We've had actual fist fights in there, we've had people assault people, lot of groping and other inappropriate behaviors that go on that people were visiting, and those things were observed and viewed by these children.

Rules of conduct were imposed for visitation areas, including a prohibition against touching or exposing breasts, buttocks or the genital area, but there were numerous infractions of this rule. Bolden acknowledged that prison officials had had "literally hundreds of cases regarding sexual misconduct."

Warden Burke testified about a letter she had received from a visiting wife which "talked about seeing triple X stuff in the visiting room, and she was referring to the groping, genital groping, breast groping, things of that sort which, you know, does go on . . . ."

Visitors were assigned specific seats or tables and were expected to remain where assigned. However, these expectations often were not realized. This was particularly true with respect to child visitors, who often left their assigned positions and mingled with other children or even with other prisoners. It was during such a wandering period that a three-year-old child was sexually assaulted by an inmate, an incident that the district judge described as a "public relations disaster" and Bolden termed "a nightmare." Bolden stated this "incident exacerbated and accelerated some things that we were already working on, and they may have prompted us to go further than we probably intended on our very own, what we were first looking at. But we were looking at some change on our visiting policies."

When the visiting rooms were fully occupied and visitors had to abide their turn in a waiting room in which there was no assigned seating, child management was even more of a

problem. Warden Langley's description is informative:

> Well, first of all, the children have to wait, sometimes for an extended period of time in a very small waiting area outside the gate. They get antsy, they are -- it's hard for them to sit still and, consequently, my officers have to ask the people that are escorting these children to keep them under control.
>
> They run up and down the hallways, they try to climb up the front of the information desk, they bump into the front gate, which causes a problem because it's an electric gate, and that can be problematic. They stick their little hands in the key bumper areas and, you know, they're children and they have a hard time trying to deal with waiting for long periods of time.

The prison officials made it clear, however, that their concern over the children's presence was not directed solely to the welfare and safety of the children. As Warden Burke pointed out, when the guards "have to spend time following a child and retrieving the child and bringing the child back, then their eyes are not watching what I view they really need to be watching."

By this statement, Burke was not referring simply to the improper sexual conduct but also, and perhaps more importantly, to the introduction of contraband. Warden Langley testified that "visitation is the largest source of the introduction of contraband into the system." Warden Burke testified that the visiting process is the most common method for the introduction of contraband into the system, "absolutely no doubt about it." Deputy Director Bolden agreed: "unquestionably." See *Inmates of Allegheny County Jail v. Pierce*, 612 F.2d 754, 759 (3d Cir. 1979). The Department's Administrative Standards provide:

> It is imperative that prisoners and visitors be closely monitored at all times to ensure that contraband is not passed and that inappropriate behavior does not occur.

Unfortunately the volume of people who enter the prisons as visitors makes close monitoring of all of them difficult, if not impossible.

Bolden testified that in 1995 well over 800,000 people visited Michigan prisons and that this created "monumental problems in terms of trying to manage resources, both space and staff resources." He continued:

> Our staff is extremely over taxed now, trying to manage -- I don't think anyone can visualize trying to process 800,000 visitors a year in terms of staff resources involved and trying to get people in, get people out, and maintain some degree of order, some degree of security in those visiting areas. That's just an overwhelming responsibility for those folks who are trying to do that.

Warden Burke testified that between May of 1994 and May of 1995, Saginaw, a 1,224 bed facility, averaged over 4,500 visitors per month, with May of 1995 seeing 6,200. She continued:

> Any time you allow anyone to traverse the secure perimeter of a facility, you take a risk. Our job is protection of public, number one. The visiting program is something that the Department has supported, but when you have that number of folks coming into a prison, there is the opportunity for contraband of all nature to be entered. Contraband gets in in a number of ways, but most contraband in a correctional facility get in via the visiting process.

When asked later whether 133 visitors at one time was a significant number of people to be inside the walls of prison during visiting hours, she responded:

> I guess I come back to my initial statement. Any time anyone traverses the secure perimeter of the facility, that's a challenge for us and so, yes, at any one time having 133 people inside your facility is certainly something that we are aware of and need to monitor closely.

Q. And why is it that you need to monitor it?

A. Throughout, you know, our system, and I think probably nationwide, it is well recognized that the visiting process is the process by which most illegal contraband gets inside a correctional facility, and when you have illegal contraband, albeit drugs, weapons, a sharp-ended anything, you have a management issue.

> Our job, again, is protection. It starts with running a safe, secure prison, and when drugs get inside a facility, that creates a whole culture, a whole issue where individuals can get hurt, staff or prisoners. People will go to no ends to manipulate that system. It just simply is a very serious security concern.

With respect to the amending regulations at issue herein, she said:

> I'm hopeful, and we have some indications already looking at our numbers that we will have fewer visits. The sheer number of visits that we have at our facility is a major issue to manage within the confines of a correctional facility, and so any reduction in numbers will

make our job easier.

> Hopefully, we will not run our visiting room at capacity as often as we have had to do in the past. That would make our officers' job easier to supervise both the indoor and outdoor visiting room. It will make visiting a more positive experience for the individuals who are visiting. We have many family members who want to come and visit and have an honest visit with their incarcerated family member.

Warden Langley, after describing the unruly conduct of visiting children, testified that a reduction in their number would help "to give the officers within the visiting room and the other areas of the visiting room better opportunity to closely monitor these types of other activities that they're supposed to be monitoring."

Visitations in Michigan's penal institutions during the period preceding the amendments at issue herein averaged 2,300 a day. This required 2,300 searches by guards at the prison gates and at the entrances to the visitation areas. Departure and reentry searches of those who found it necessary to leave the visitation area temporarily also were required. Constant surveillance of the visitation area itself had to be conducted whenever it was occupied. Thorough post-visitation searches of the inmates also was required to uncover the possible possession of contraband. These duties clearly fall within the ambit of "complicated, expensive, and time-consuming processes" referred to by the Supreme Court in *Block, supra*, 468 U.S. at 588 n.9. We now are asked to hold that these burdens, with all their unfortunate ramifications, can be imposed upon Michigan's penal institutions as a matter of constitutional right. We decline to do so.

In arriving at this decision, we apply the standard of

review stated and reiterated by the Supreme Court; viz., that problems of prison administration are peculiarly for resolution by prison authorities and their resolution should be accorded deference by the courts. See *Washington v. Harper*, 494 U.S. 210, 224, 108 L. Ed. 2d 178, 110 S. Ct. 1028 (1990); *Turner v. Safley*, 482 U.S. 78, 84-96, 96 L. Ed. 2d 64, 107 S. Ct. 2254 (1987); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349, 96 L. Ed. 2d 282, 107 S. Ct. 2400 (1987); *Bell v. Wolfish*, 441 U.S. 520, 547, 60 L. Ed. 2d 447, 99 S. Ct. 1861 (1979). Moreover, where, as here, a state penal system is involved, federal courts have "additional reason to accord deference to the appropriate prison authorities." *Turner, supra*, 482 U.S. at 86 (citing *Procunier v. Martinez*, 416 U.S. 396, 405, 40 L. Ed. 2d 224, 94 S. Ct. 1800 (1974)). The important word, one that appears specifically or by implication in all the pertinent Supreme Court opinions, is "deference."

Appellants attempt to avoid the concept of deference by arguing that, because the district court proceeded by grant of summary judgment, it should have construed the evidence in the light most favorable to them. Indeed, because appellees moved for summary judgment before filing their answer, appellants contend that every allegation in their complaint should have been accepted as true. We are not persuaded. Utilization of these summary judgment concepts would not be an act of deference. It would, instead, be a usurpation of the original decision-making process which the Supreme Court has placed in the hands of the prison officials.

The issue in the instant case was basically one of law, viz., were the amendments of the prison regulations reasonably related to and supportive of legitimate penological interests. If they were, the district court's inquiry could be terminated. *See Block, supra*, 468 U.S. at 589; *see also O'Bryan v. County of Saginaw*, 741 F.2d 283, 285 (6th Cir. 1984). We find no merit in appellant's belated claims that

they should have had an opportunity for discovery as to the motive and intent of the prison officials. No request for such discovery was made in the district court; prison officials were examined at length in connection with appellants' preliminary injunction motion, and no motive or intent other than legitimate penological interests is even suggested. The prison officials' purpose in promulgating the regulations at issue was to protect both the penal institutions and their visitors. Comments by attorneys on both sides indicated that the officials were well along in the accomplishment of this purpose. The district court properly concluded that nothing in the Constitution precluded the officials from pursuing their salutary efforts.

Our decision to affirm is supported by the well-established principle that there is no inherent, absolute constitutional right to contact visits with prisoners. *See Bellamy v. Bradley*, 729 F.2d 416, 420 (6th Cir.) ("Prison inmates have no absolute constitutional right to visitation."), *cert. denied*, 469 U.S. 845, 83 L. Ed. 2d 93, 105 S. Ct. 156 (1984); *O'Bryan, supra*, 741 F.2d at 285; *Percy v. Jabe*, 823 F. Supp. 445, 448 (S.D. Mich. 1993). A properly imposed ban on contact visits will survive claims of Due Process violation. *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 460-61, 104 L. Ed. 2d 506, 109 S. Ct. 1904 (1989); *see Hewitt v. Helms*, 459 U.S. 460, 468, 74 L. Ed. 2d 675, 103 S. Ct. 864 (1983). The same is true of the First Amendment right of association. *See Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 129-30, 53 L. Ed. 2d 629, 97 S. Ct. 2532 (1977); *Southerland v. Thigpen*, 784 F.2d 713, 717 (5th Cir. 1986). Restrictions, in the nature and amount of those involved herein, cannot be said to constitute cruel and unusual punishment under the Eighth Amendment. Appellants err in their contention that the restrictions at issue apply to both contact and non-contact visits. A fair reading of the amendments makes it clear that they apply only to the

former. Moreover, to the extent, if any, that they may be construed as "punishments," they are punishments that are imposed upon every prisoner at the time of sentencing. They are the "rules of the game" pursuant to which the Michigan penal system operates.

Depending upon how it is construed and applied, the rule, which denies a prisoner all visitation privileges upon his or her having been found guilty of violating two major regulations involving substance abuse, might be construed as a form of punishment that merits different treatment. However, the district court did not believe that this issue was ripe for resolution, and we cannot quarrel with this determination. In its present form, the rule requires the fleshing out that comes from attempted enforcement. *See, e.g., Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 461, 89 L. Ed. 1725, 65 S. Ct. 1384 (1945).

Viewed from a constitutional standpoint, if, as we now hold, the prison officials properly limited the visitation rights of the prisoners because the limitations were reasonably related to legitimate penological interests, the effect of these regulations upon persons outside the prison was largely irrelevant. In *Thornburgh v. Abbott*, 490 U.S. 401, 410 n.9, 104 L. Ed. 2d 459, 109 S. Ct. 1874 (1989), the Court said:

> We do not think it sufficient to focus, as respondents urge, on the identity of the individuals whose rights allegedly have been infringed. Although the Court took special note in *Procunier v. Martinez*, 416 U.S. 396, 40 L. Ed. 2d 224, 94 S. Ct. 1800 (1974), of the fact that the rights of nonprisoners were at issue, and stated a rule in *Turner v. Safley*, 482 U.S. 78, 96 L. Ed. 2d 64, 107 S. Ct. 2254 (1987), for circumstances in which "a prison regulation impinges on inmates' constitutional rights," *Id.*, at 89 (emphasis added), any attempt to forge separate standards for cases

> implicating the rights of outsiders is out of step with the intervening decisions in *Pell v. Procunier*, 417 U.S. 817, 41 L. Ed. 2d 495, 94 S. Ct. 2800 (1974); *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 53 L. Ed. 2d 629, 97 S. Ct. 2532 (1977); and *Bell v. Wolfish*, 441 U.S. 520, 60 L. Ed. 2d 447, 99 S. Ct. 1861 (1979). These three cases, on which the Court expressly relied in *Turner* when it announced the reasonableness standard for "inmates' constitutional rights" cases, all involved regulations that affected rights of prisoners and outsiders.

In *Goodwin v. Turner*, 908 F.2d 1395, 1399 (8th Cir. 1990), the court enlarged upon this legal exposition:

> We cannot subject prison regulations to strict scrutiny every time a family member is affected by the prison regulation. Incarceration necessarily deprives an individual of the freedom "to be with family and friends and to form the other enduring attachments of normal life." *Morrissey v. Brewer*, 408 U.S. 471, 482, 92 S. Ct. 2593, 2600, 33 L. Ed. 2d 484 (1972). By its very nature, incarceration necessarily affects the prisoner's family. *See Southerland v. Thigpen*, 784 F.2d 713, 717-18 (5th Cir. 1986). For example, a wife's constitutional right to freedom of association is directly impinged by prison regulations which limit her ability to visit with her husband while he is incarcerated. We would not, however, subject such a regulation to strict scrutiny merely because her associational rights were implicated. Such restrictions on the prisoner's liberty would be sustained if they were reasonably related to achieving a legitimate penological objective. To that extent, the wife's associational rights are not relevant.

In *Brewer v. Wilkinson*, 3 F.3d 816, 823 n.9 (5th Cir. 1993), *cert. denied*, 510 U.S. 1123, 127 L. Ed. 2d 397, 114 S. Ct. 1081 (1994), the court said:

> Thus, the *Thornburgh* Court stressed *Turner's* mandate that even though prison regulations or practices might burden the fundamental rights of "outsiders," the proper inquiry was whether the regulation or practice in question was reasonably related to legitimate penological objectives.

Similar reasoning has been applied in Federal Sentencing Guidelines cases in which prisoners seek special treatment because of family circumstances. Although "the imposition of prison sentences normally disrupts spousal and parental relationships," *United States v. Daly*, 883 F.2d 313, 319 (4th Cir. 1989), *cert. denied*, 496 U.S. 927, 110 L. Ed. 2d 643, 110 S. Ct. 2622 (1990), and "it is not uncommon for innocent young family members, including children . . . to suffer as a result of a parent's incarceration," *United States v. Brewer*, 899 F.2d 503, 508 (6th Cir.) (internal quotation marks omitted; alteration in original), *cert. denied*, 498 U.S. 844, 112 L. Ed. 2d 95, 111 S. Ct. 127 (1990), "the spectre of harm to innocent family members should not be permitted to insulate a felon from the condign consequences of his criminal deportment, nor to entrammel the execution of a fair and just sentence," *United States v. DeCologero*, 821 F.2d 39, 44 (1st Cir. 1983).

In sum, we hold that the district court correctly ruled with respect to both the prisoners and the outsiders, and we affirm its judgment. That portion of the appeal directed to the denial of the preliminary injunction motion thus becomes moot.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Michelle Bazzetta, Stacy Barker, Toni Bunton, Debra King, Shante Allen, Adrienne Bronaugh, Alesia Butler, Tamara Prude, Susan Fair, Valerie Bunton and Arturo Zavala, through his Next Friend Valerie Bunton, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

No. 95-73540
Hon. Nancy G. Edmunds

Kenneth McGinnis Director of Michigan Dep't of Corrections, Dan Bolden, Deputy Director of the Correctional Facilities, Michigan Dep't of Corrections,

Defendants

_____/

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANTS' MOTION TO DISMISS AND/OR FOR SUMMARY JUDGMENT

This matter comes before the court on Defendants' motion to dismiss and/or for summary judgment. Plaintiffs originally brought this case challenging new Michigan prison rules restricting the visitation rights of state prisoners in state court. Defendants thereafter removed the case to federal

court. Plaintiffs sought a preliminary injunction, but this court denied their motion on the basis that Plaintiffs had failed to prove a likelihood of success on the merits. Defendants now bring this motion to dismiss and/or for summary judgment.

I. FACTS

Plaintiffs are a group of women prisoners and their prospective visitors pretesting new Michigan Correctional rules regarding visitation. The new rules in question are:

1. Prisoners may only receive visitors under the age of 18 who are their children, step-children or grandchildren (thus prisoners may not see minor siblings, cousins, nieces, nephews, etc.)(Rule 791.6609(2)(b));

2. Prisoners may not visit with their natural children if their parental rights have been terminated for any reason (Rule 791.6609(6)(a));

3. Prisoners may only have 10 visitors who are not "immediate family" (immediate family does not include nieces, nephews, aunts, uncles, cousins, in-laws)(Rule 791.6609(2));

4. No minor children may visit unless accompanied by an adult legal guardian with proof of legal guardianship or an immediate family member (Rule 791.6609(5));

5. Members of the public may be on only one prisoner's visitation list (not including immediate family members), thus activists cannot visit more than one prisoner (Rule 791.6609(2)(a));

6. Prisoners may be denied all visitors (except from clergymen or an attorney) upon two major misconducts involving substance abuse (Rule 791.6609(11)(d));

7. All former prisoners are excluded from visiting current prisoners who are not "immediate family."

Plaintiffs sought a preliminary injunction to enjoin enforcement of the new rules. This court denied the motion on the basis that Plaintiffs could not show a likelihood of success on the merits. Thereafter, Plaintiffs sought to certify their case as a class action, which this court granted, dividing Plaintiffs into two sub-classes: one class made up of prisoners and the other made up of non-prisoners affected by the new prison regulations. In their Second Amended Complaint, Plaintiffs contend that the rules violate their First, Eighth and Fourteenth Amendment Constitutional rights. In particular, they allege in:

Count I: the visitation restrictions with family members violate Plaintiffs' fundamental right to integrity in family relationships in violation of the First, Ninth and Fourteenth Amendments;

Count II: the visitation restrictions prohibiting the public from visiting with more than one prisoner in the State of Michigan during any given interval of time violates both sub-classes' right to freedom of speech and association under the First Amendment;

Count III: the visitation restrictions constitute cruel and unusual punishment in violation of the Eighth Amendment;

Count IV: the visitation restrictions violate the equal protection clause of the Fourteenth Amendment;

Count V: the visitation restrictions that permanently restrict all visitation for a Plaintiff prisoner found guilty of two misconducts related to substance abuse constitute cruel and unusual punishment in violation of the Eighth Amendment.

Defendants now seek to have the court grant their motion to dismiss and/or for summary judgment.

II. Standards of Review

A. Motion to Dismiss

A motion to dismiss under Rule 12(b)(6) tests the sufficiency of a complaint. *Elliot Co., Inc. v. Caribbean Utilities Co., Ltd.*, 513 F.2d 1176, 1182 (6th Cir. 1975). In so doing, the court "must construe the complaint in the light most favorable to the plaintiff, accept all factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief." *In re Delorean Motor Company*, 991 F.2d 1236, 1240 (6th Cir. 1993). The complaint must include direct or indirect allegations "respecting all the material elements to sustain a recovery under some viable legal theory." *Id.* (citations omitted). the motion to dismiss should not be granted "unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Elliot*, 513 F.2d at 1182.

B. Standard of Summary Judgment

Summary judgment is appropriate only when there is no

genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R. Civ. P. 56(c). The central inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). After adequate time for discovery and upon motion, rule 56(c) mandates summary judgment against a party who fails to establish the existence of an element essential to that party's case and on which that party bears the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

The movant has an initial burden of showing "the absence of a genuine issue of material fact." *Celotex*, 477 U.S. 317, 323. Once the movant meets this burden, the non-movant must come forward with specific facts showing that there is a genuine issue for trial. *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). To demonstrate a genuine issue, the non-movant must present sufficient evidence upon which a jury could reasonably find for the non-movant; a "scintilla of evidence" is insufficient. *Liberty Lobby*, 477 U.S. at 252.

The court must believe the non-movant's evidence and draw "all justifiable inferences" in the non-movant's favor. *Liberty Lobby*, 477 U.S. at 255. The inquiry is whether the evidence presented is such that a jury applying the relevant evidentiary standard could "reasonably find for either the plaintiff or the defendant." *Liberty Lobby*, 477 U.S. at 255.

III. Analysis

As a preliminary matter, Plaintiffs contend that the evidence adduced during the preliminary injunction hearing is not suitable for this court to consider in determining a summary judgment motion. Plaintiffs cite *University of*

Texas v. Camenisch, 451 U.S. 390, 395 (1981) and *Wilcox v. U.S.*, 888 F.2d 1111, 1114 (6th Cir. 1989) in support of this assertion. These cases, however, stand for a different proposition. In *Camenisch*, the Supreme Court stated the general rule,

> A party thus is not required to prove his case in full at a preliminary injunction hearing. . . . and the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits. . . . In light of these considerations, it is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits.

Camenisch, 451 U.S. at 395. This reasoning was followed by the Sixth Circuit in *Wilcox*. In that case, the district court denied the plaintiff's motion for preliminary injunction against the Internal Revenue Service. Thereafter, the district court granted the IRS' summary judgment motion on the basis that the preliminary injunction hearing was dispositive "because it was the law of the case." *Id.* at 1113. The Sixth Circuit reversed, holding that "decisions on preliminary injunctions do not constitute law of the case and parties are free to litigate the merits." *Id.* at 114 (quoting with approval *Golden State Transit Corp. v. City of Los Angeles*, 754 F.2d 830, 832 n. 1 (9th Cir. 1985)(further quotations and citations omitted). Hence, this court may not grant Defendants' summary judgment merely on the basis that Plaintiffs' preliminary injunction motion was denied because of a lack of likelihood of success on the merits. Despite Plaintiffs' assertions to the contrary, however, this court may consider testimony and evidence introduced at the preliminary injunction hearing as party of the record in determining whether a genuine issue of material fact does not exist

requiring the court to grant Defendants' motion for summary judgment. The counts of Plaintiffs' Complaint will be addressed separately.

A. Count I

In Count I, Plaintiffs allege that the new visitation rules restricting visitation with family members under the age of eighteen are an unreasonable and arbitrary deprivation of the Plaintiffs' rights to freedom of association, family integrity, privacy and due process under the First, Ninth and Fourteenth Amendments.

1. Prisoner's first Amendment Claim

Convicted prisoners generally have no absolute, unfettered constitutional right to unrestricted visitation with any person regardless of whether that person is a family member or not. *Lynott v. Henderson*, 610 F.2d 340 (5th Cir. 1980). Rather, visitation privileges are subject to the discretion of prison officials. *McCray v. Sullivan*, 509 F.2d 1332 (5th Cir.), *cert. denied*, 423 U.s. 859 (1975). In *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 u.S. 119 (1977), the Supreme Court stated,

> The fact of confinement and the needs of the penal institution impose limitations on constitutional rights, including those derived from the First Amendment, which are implicit in incarceration . . . Perhaps the most obvious of the First Amendment rights that are necessarily curtailed by confinement are those associational rights that the First Amendment protects outside of prison walls. The concept of incarceration itself entails a restriction on the freedom of inmates to associate with those outside the penal institution.

433 U.S. at 125. The Sixth Circuit has yet to opine whether prisoners have a First Amendment freedom of association right to visitation. *Long v. Norris*, 929 F.2d 1111 (6th Cir.), *cert. denied*, 502 U.S. 863 (1991)("[W]e have not decided the degree to which prison inmates retain their freedom of association. . . . Given the sparse authority on this issue, we hold that any such right, if it exists, is not clearly established." *Id.* at 1118). A survey of caselaw from other circuits leads this court to find that the greater weight of authority holds that no First Amendment right of freedom of association exists for prisoners. *See, e.g., White v. Keller*, 438 F. Supp. 110, 115 (D. Md. 1977), *aff'd per curiam*, 588 F.2d 913 (4th Cir. 1978); *Thorne v. Jones*, 765 F.2d1270, 1274 (5th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986). Accordingly, the Plaintiff prisoners' First Amendment claim fails to state a claim upon which relief can be granted.

2. Non-prisoners' First Amendment Claim

The First Amendment rights of the non-prisoner class are similarly restricted by the fact of the restrictions placed upon the prisoners. *See, White v. Keller*, 438 F. supp. 110, 115 (D. Md. 1977), *aff'd per curiam*, 588 F.2d 913 (4th Cir. 1978). the court in *White* explained,

> It is the further opinion of this court that the Supreme Court itself has suggested there is no general right to prison visitation for either the prisoners or the public. In *Pell v. Procunier*, . . . the court held that prisoners have no constitutional right to visit with members of the press and that members of the press have no constitutional right to visit with selected prisoners. Although the Court's principal concern was freedom of expression --press and speech-- rather than freedom of association, the result was nonetheless that the two

> groups had no right to visit with each other. Implicit in the Court's opinion is that prisoners have no right to associate face-to-face with any particular member of the public, and members of the public have no right to so associate with any particular prisoner. . . . The foregoing clearly explains why this court believes there is no right among prisoners to receive visitors. The court believes that the non-existence of a right among would-be visitors to visit prisoners is a necessary corollary whose justification is apparent by resort to the *reductio ad absurdum*.

White, 438 F. Supp. at 117-119 (aff'd per curiam). *See also, Fennell v. Carlson*, 466 F. Supp. 56, 59 (W.D. Okla. 1978). Whereas First Amendment rights are implicated in the censorship of mail, prisoners and visitors have no First Amendment right to visitation because alternative means of exercising their First Amendment rights are available. The Plaintiff non-prisoners First Amendment Count therefore also fail to state a claim upon which relief can be granted.

3. Plaintiffs' Family Integrity Claim

Plaintiffs also claim that the visitation rules restricting which minor children may visit a prison violate the prisoners' fourteenth Amendment fundamental right to family integrity. the Fourteenth Amendment prohibits a State from depriving a person of life, liberty, or property without due process of law and protects "the individual against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). Plaintiffs are attempting to extend the reasoning of *Moore v. City of Cleveland*, 431 U.S. 494 (1977), to the current context.

In *Moore*, the Supreme Court struck down the city's zoning laws which prohibited a grandmother from living with

her son and her grandson. *Id.* The Court held that the concept of liberty in the Fourteenth Amendment includes the right to associate and reside with one's relatives. *Id.* The Plaintiffs here argue that the new rules impermissibly interfere with family relationships as did the zoning ordinance in *Moore*, and thus violate the Plaintiffs' liberty interest in family association.

The instant case, however, is distinguishable from *Moore*. In *Moore*, the Supreme Court was concerned with the fact that a grandmother and grandson could not live together. In this case, grandparents and parents may see their minor grandchildren and children. The Plaintiffs are seeking to extend the reasoning of *Moore*, to even further extensions of the family tree. While dicta in *Moore* discusses extended family relationships, holding for the Plaintiffs in this case would go well beyond established precedent.

Furthermore, *Moore* involved free citizens who wished to live together. That case is quite distinct from the current case where prisoners are petitioning for visitation rights. Incarceration by its very nature necessarily restricts the familial relationship in ways that would be unacceptable in free society: imprisonment deprives inmates of the freedom "to be with family and friends and to form the other enduring attachments of normal life." *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972). For example, it is well established that prisoners have no right to conjugal visits. *Turner*, 482 U.s. at 95-96. The new regulations restricting the visitation of minor children do not infringe upon the Plaintiffs' fundamental right of family integrity.

Plaintiffs argue that this court "ruled only that [the right to family integrity] is limited to the parent/child/grandchild relationship" and, therefore, that Plaintiffs have stated a claim. The only regulation to which Plaintiffs could be referring is that regulation prohibiting minor children from visiting the prison unless accompanied by an immediate

family member or adult legal guardian. The visitation rule may have the effect of preventing some children from visiting their parents, step-parents or grandparents because no qualified individual is available to bring the child to the prison. This circumstance does not require the court to find the rule unconstitutional. In fact, courts have held that it is constitutional to transfer prisoners from a prison near their family to one too far away for the family to visit, despite the obvious limitation on family visitation. *See e.g.*, *Pitts v. Meese*, 684 F. Supp. 303, 312 (D.D.C. 1987), *aff'd*, *Pitts v. Thornburgh*, 866 F.2d 1450 (D.C. Cir. 1989). The *Pitts* court followed and extended the reasoning laid out by the Supreme Court in *Olim v. Wakinekona*, 461 U.S. 238 (1983). In *Olim*, the Court held that a prisoner "has no justifiable expectation that he will be incarcerated in any particular prison within a State, [and] he has no justifiable expectation that he will be incarcerated in any particular State." *Id.* at 245. The court went on to instruct.

> In short, it is neither unreasonable nor unusual for an inmate to serve practically his entire sentence in a State other than the one in which he was convicted and sentenced, or to be transferred to an out-of-state prison after serving a portion of his sentence in his home State. . . . Even when, as here, the transfer involves long distances and an ocean crossing, the confinement remains within constitutional limits. . . . The reasoning of *Meachum* [*v. Fano*, 427 U.S. 215 (1976)] and *Montayne* [*v. Haymes*, 427 U.S. 236 (1976)] compels the conclusion that an interstate prison transfer, including one from Hawaii to California, does not deprive an inmate of any liberty interest protected by the Due Process of Clause in and of itself.

Id. at 247-48. Following this reasoning, the court in *Pitts*

found that the incarceration of women prisoners in a facility far from their families did not infringe on their constitutional rights. *Pitts*, 684 F. Supp. at 312.

Similarly, in this case, prisoners may be prevented from seeing their children because no qualified adult is available to bring the children into the prison. However, as stated by the Supreme Court, the inaccessibility of a prisoner to his family "does not deprive an inmate of any liberty interest protected by the Due Process Clause in and of itself." *Id.*

Even if Plaintiffs could survive a motion to dismiss as to this claim, they cannot survive a motion for summary judgment. Any restriction on a fundamental right must be "reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 79 (1987). In *Turner*, the Court listed four factors that courts should consider in determining whether such a prison regulation is reasonable:

1. whether a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it exists;

2. whether there are alternative ways for the prisoner to exercise the implicated constitutional right;

3. what impact would accommodation of the implicated constitutional right have on the prison administration;

4. whether the regulation is an exaggerated response to prison concerns.

Id. at 89-90

Witnesses for the Defendants testified during the preliminary injunction hearing that their legitimate penological interests in limiting visitation of minors are: 1) preventing children from suffering physical and sexual abuse,

2) preventing children from being injured in the non-child proofed visitation rooms, and 3) limiting the instances in which children can be used to smuggle weapons, drugs or other contraband into the prisons; and 4) reducing the volume of visits to ensure the safety of both prisoners and visitors. (*See* testimony of Warden Burke, Tr. Vol. I at 119-24, Vol. II at 8, 10-11, testimony of Warden Langley, Tr. Vol. II at 65-78; testimony of Deputy Director Bolden, Tr. Vol. II at 82-86, 100). Defendants further articulated that family members and guardians are best suited to controlling children. (*See* testimony of director Bolden, Tr. Vol. I at 98). For example, when asked about the penological interests sough to be served by the new regulations, Director Bolden answered,

> Well, I think our interest was to minimize the opportunity for harm or risk to come to children that come to our facilities. Our experience has also taught us that there has been less opportunity or less occurrence of a child that's the child of the person they're visiting being victimized by someone else.
>
> Most of the cases we looked at, particularly the Higgen situation, the child that was brought up there was not the child of any prisoner that she was visiting, and there seemed to be a more protective atmosphere when a child is there visiting their parent, and they seemed to keep up with that child a little more, and you don't run into the risk of some other person who may not be visiting that child, molesting that child.

(Testimony of Director Bolden, Tr. Vol. I at 98). Director Bolden further testified that he anticipated an overall decrease of ten to fifteen percent in visitation. (*Id.* at 99).

Courts have consistently held that the maintenance of

prison security and prevention of contraband from entering the prison are "legitimate penological" interests. *See Turner*, 482 U.S. at 92-93; *Procunier*, 416 U.S. at 413-14; *Bell v. Wolfish*, 441 U.S. at 520 (1979). Having found the penological interest to be legitimate, then

> In the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these consideration[,] courts should ordinarily defer to [prison administrators'] expert judgment in such matters.

Block v. Rutherford, 468 U.S. 576, 586-89 (1984). In this case, the Plaintiffs have failed to come forward with substantial evidence that the Michigan prison officials exaggerated their response. Moreover, Defendants articulated problems associated with supervising children and their position that family members are best suited to control a child. (*See* Testimony of Director Bolden, Tr. Vol. I at 98). Having put forth a valid, legitimate interest, and in the absence of any evidence showing that officials have exaggerated their response, the court finds that Plaintiffs have failed to meet their burden to demonstrate that a genuine issue of material fact exists.

4. Plaintiffs' Ninth Amendment Claim

Plaintiffs also brought suit pursuant to the Ninth Amendment, claiming that their right to privacy has been violated by the new prison visitation regulations. Plaintiffs, however, can cite no case supporting this claim. Plaintiffs thus have failed to state a claim as a matter of law in count I of their Second Amended Complaint. Consequently, Count I of the Plaintiffs Complaint is dismissed.

B. Count II

In Count II, Plaintiffs contend that the new prison visitation regulations that restrict members of the public from visiting more than one non-immediate family member prisoner within a certain time interval is a violation of the non-prisoner's rights to freedom of association. This cause of action fails to state a claim. Once again, the rights of non-prisoners are similarly restricted by the incarceration of the prisoner.[1]

C. Count III

In Count III, Plaintiffs allege that the new regulations constitute cruel and unusual punishment in violation of the Eighth Amendment. Eighth Amendment violations occur when prison conditions result in the "unnecessary and wanton infliction of pain," are "grossly disproportionate to the severity of the crime warranting imprisonment," or result in an "unquestioned and serious deprivation of basic human needs." *Rhodes v. Chapman*, 452 U.S. 337, 346-47 (1981). However, "to the extent that conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offense against society." *Id.* at 347. The Sixth Circuit has indicated that prohibiting visitation to prisoners does not violate the Eighth Amendment. *Bellany v. Bradley*, 729 F.2d 416 (6th Cir. 1984). Other circuit courts of appeals have also found no Eighth Amendment violations where visitation privileges have been restricted. *See e.g., Furrow v. Magnusson*, No. 91-1585, 1992 WL 73154, *2 (1st Cir. April 10, 1992)("Prisoner grievances involving visitation privileges and confiscation of

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[1]See discussion at page 7, *supra*.

photographs obviously are not nearly weighty enough to implicate the Eighth Amendment's ban on cruel and unusual punishment."); *Smith v. Farley*, No. 94-1046, 1995 WL 216896, *4 (7th Cir. April 4, 1995)(citing *Wilson v. Seiter*, 501 U.S. 294 (1961)). Plaintiffs, therefore, have no claim that the regulations violate the Eighth Amendment.

D. Count IV

In Count IV, Plaintiffs allege that the rules prohibiting: 1) visits from former prisoners except with immediate family members; 2) the public from visiting more than one prisoner during any given interval of time; and 3) visits from non-immediate family members under the age of eighteen years, violate the non-prisoners' First Amendment rights and their Fourteenth Amendment right to equal protection.

1. First Amendment Claim

As to the non-prisoner plaintiffs, their rights to visit prisoners are similarly restricted by the fact of the prisoner's incarceration.[2]

b. The Equal Protection Claim

Plaintiffs also claim that the new regulations violate their Fourteenth Amendment right to equal protection. The Supreme court has instructed,

> [U]nless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect

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[2]See discussion at page 7, *supra*.

> characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest.

Nordlinger v. Hahn, 112 S. Ct. 2326, 2331-32 (1992). Here, a fundamental right is not jeopardized, and the alleged discrimination is not on the basis of an inherently suspect characteristic. Consequently, the regulations must only pass the requirements of the rational basis test. Defendants have articulated legitimate state interests: the preservation of order within the prison system by preventing contraband from entering the premises and the protection of minor children by ensuring that they are properly supervised. Furthermore, the regulations are properly tailored to rationally achieve those interests. Plaintiffs have come forward with no evidence demonstrating that the regulations will not achieve the legitimate state interests. Accordingly, Defendants' motion for summary judgment will be granted.

E. Count V

As previously noted by this court, Plaintiffs' claims that the visitation rule restricting all visitation privileges upon a prisoner's being found guilty of two major misconducts involving substance abuse violates the Eighth and Fourteenth Amendments is not ripe for decision. Plaintiffs have failed to come forward with any example of a prisoner being denied visitation rights as a result of this rule. As the Supreme Court stated, "[a] hypothetical threat is not enough." *United Public Workers v. Mitchell*, 330 U.S. 75, 89-91 (1947). Because this claim is not ripe, Plaintiffs do not have standing at this time. Accordingly, Count V of Plaintiffs' Second Amended Complaint is properly dismissed.

IV. Conclusion

For the foregoing reasons, the court hereby GRANTS Defendants' motion to dismiss and/or for summary judgment.

NANCY C. EDMUNDS
U.S. District Judge

Dated: Apr 09, 1996

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Michelle Bazzetta, Stacy Barker, Toni Bunton, Debra King, Shante Allen, Adrienne Bronaugh, Alesia Butler, Tamara Prude, Susan Fair, Valerie Bunton and Arturo Zavala, through his Next Friend Valerie Bunton, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

Kenneth McGinnis Director of Michigan Dep't of Corrections, Dan Bolden, Deputy Director of the Correctional Facilities, Michigan Dep't of Corrections,

Defendants

/

No. 95-73540
Hon. Nancy G. Edmunds

MEMORANDUM OPINION AND ORDER DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

This matter comes before the court on Plaintiffs' motion for preliminary injunction to prevent enforcement of certain Michigan prison regulations restricting prisoner's visitation rights. For the following reasons, Plaintiffs motion for preliminary injunction is denied.

I. Facts

Plaintiffs are a group of women prisoners and their prospective visitors protesting new Michigan Correctional Rules regarding visitation. The new rules in question are:

1. Prisoners may only receive visitors under the age of 18 who are their children, step-children or grandchildren (thus prisoners may not see minor siblings, cousins, nieces, nephews, etc.) (Rule 791.6609(2)(b));

2. Prisoners may not visit with their natural children if their parental rights have been terminated for any reason (Rule 791.6609(6)(a));

3. Prisoners may only have 10 visitors who are not "immediate family" (immediate family does not include nieces, nephews, aunts, uncles, cousins, in-laws) (Rule 791.6609(2));

4. No minor children may visit unless accompanied by an adult legal guardian with proof of legal guardianship or an immediate family member (Rule 791.6609(5));

5. Members of the public may be on only one prisoner's visitation list (not including immediate family members) thus activists cannot visit more than one prisoner (Rule 791.6609(2)(a));

6. Prisoners may be denied all visitors (except from clergymen or an attorney) upon two major misconducts involving substance abuse (Rule 791.6609(11)(d));

7. All former prisoners are excluded from visiting current prisoners who are not "immediate family."

Plaintiffs contend that the above rules violate their First, Eighth and Fourteenth Amendment Constitutional rights, and brought suit in Michigan State Court pursuant to 42 U.S.C. § 1983. The rules were scheduled to go into effect on October 2, 1995, so Plaintiffs brought a motion for a temporary restraining order and preliminary injunction to enjoin enforcement of the new rules. The Defendants removed the action to this court under the authority of 28 U.S.C. §§ 1441(a) and 1446. The court entered a temporary restraining order enjoining enforcement of the rules until a preliminary injunction hearing could be held.

II. Standard for Preliminary Injunction

The availability of injunctive relief is a procedural question that is governed by federal law. *Southern Milk Sales, Inc. v. Martin*, 924 F.2d 98 (6th Cir. 1991). The Sixth Circuit has held that a court must consider four factors in deciding whether to issue a preliminary injunction:

1. whether the movant has shown a strong or substantial likelihood of success on the merits;

2. whether the movant has demonstrated irreparable injury;

3. whether the issuance of a preliminary injunction would cause substantial harm to others; and

4. whether the public interest is served by the issuance of an injunction.

Parker v. U.S. Dept. of Agric., 879 F.2d 1362, 1367 (6th Cir. 1989). The foregoing factors should balanced. *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985).

Where the three factors other than the likelihood of success all strongly favor issuing the injunction, a district court is within its discretion in issuing a preliminary injunction if the merits present a sufficiently serious question to justify a further investigation. *Id.* at 1230. Alternatively, the court may also issue a preliminary injunction if the movant "at least shows serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to the defendant if an injunction is issued." *Frisch's Restaurant, Inc. v. Shoney's Inc.*, 759 F.2d 1261, 1270 (6th Cir. 1985) (citations omitted).

III. Analysis

A. Likelihood of Success on the Merits

To prevail in a civil rights action under 42 U.S.C. § 1983, a plaintiff must plead and prove that the defendants, acting under color of state law, deprived the plaintiff of a right secured by the Constitution and laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 68 L. Ed. 2d 420, 101 S. Ct. 1908 (1981), *overruled on other grounds*, *Daniels v. Williams*, 474 U.S. 327, 88 L. Ed. 2d 662, 106 S. Ct. 662 (1986). Section 1983 alone creates no substantive rights; rather, it is a vehicle by which a plaintiff may seek redress for deprivations of rights established in the Constitution or federal laws. *Baker v. McCollan*, 443 U.S. 137, 144 n.3, 61 L. Ed. 2d 433, 99 S. Ct. 2689 (1979). The statute applies only if there is a deprivation of a federal right. *See e.g.*, *Paul v. Davis*, 424 U.S. 693, 699-701, 47 L. Ed. 2d 405, 96 S. Ct. 1155 (1976); *Baker*, 443 U.S. at 146-47. Thus, "the first inquiry in any § 1983 suit . . . is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws'" of the United States. *Baker*, 443 U.S. at 140.

The Plaintiff prisoners claim that the new prisoner

visitation rules will deprive them of rights under the First, Eighth and Fourteenth Amendments to the United States Constitution. Prison regulations that implicate a prisoner's constitutional rights will be upheld when "it is reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89, 96 L. Ed. 2d 64, 107 S. Ct. 2254 (1987). The non-prisoner Plaintiffs claim that the new rules will deprive them of rights under the First and Fourteenth Amendments. Prison regulations must respect the constitutional rights of non-prisoners and are subject to that level of scrutiny determined by the Supreme Court for the particular constitutional violations in question. *Cf. Procunier v. Martinez*, 416 U.S. 396, 40 L. Ed. 2d 224, 94 S. Ct. 1800 (1974) (Court applied strict scrutiny analysis to infringement of non-inmate's First Amendment rights).

1. Are the Constitutional Rights of the Plaintiff Prisoners Implicated by the New Regulations?

    a. Rules restricting visitation of minor children and the overall number of visitors

Plaintiffs first claim that the regulations restricting visitation of minor children and the overall number of visitors a prisoner may see to ten, violate their constitutional right of freedom of association. Convicted prisoners, however, have no absolute, unfettered constitutional right to unrestricted visitation with any person, regardless of whether that person is a family member or not. *Bellamy v. Bradley*, 729 F.2d 416, 420 (6th Cir.), *cert. denied*, 469 U.S. 845, 83 L. Ed. 2d 93, 105 S. Ct. 156 (1984); *Lynott v. Henderson*, 610 F.2d 340 (5th Cir. 1980). Rather, visitation privileges are subject to the discretion of prison officials. *McCray v. Sullivan*, 509 F.2d 1332 (5th Cir.), *cert denied*, 423 U.S. 859, 46 L. Ed. 2d 86, 96 S. Ct. 114 (1975). In *Jones v.*

North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 53 L. Ed. 2d 629, 97 S. Ct. 2532 (1977), the Supreme Court stated,

> The fact of confinement and the needs of the penal institution impose limitations on constitutional rights, including those derived from the First Amendment, which are implicit in incarceration . . . . Perhaps the most obvious of the First Amendment rights that are necessarily curtailed by confinement are those associational rights that the First Amendment protects outside of prison walls. The concept of incarceration itself entails a restriction on the freedom of inmates to associate with those outside the penal institution.

433 U.S. at 125-25. The Sixth Circuit has yet to opine whether prisoners have a First Amendment freedom of association right to visitation. *Long v. Norris*, 929 F.2d 1111 (6th Cir.), *cert. denied*, 502 U.S. 863, 112 S. Ct. 187, 116 L. Ed. 2d 148 (1991) ("We have not decided the degree to which prison inmates retain their freedom of association. . . . Given the sparse authority on this issue, we hold that any such right, if it exists, is not clearly established." *Id.* at 1118). Other Circuit courts have held that no First Amendment right to visitation exists. *White v. Keller*, 438 F. Supp. 110, 115 (D. Md. 1977), *aff'd per curiam*, 588 F.2d 913 (4th Cir. 1978) (finding that prisoner visitation occurs for social rather than ideological purposes and further that "visitation does not seem to be a right, but merely one means of effecting a wholly distinct right." Id. at 117); *Thorne v. Jones*, 765 F.2d 1270, 1274 (5th Cir. 1985), *cert. denied*, 475 U.S. 1016, 89 L. Ed. 2d 313, 106 S. Ct. 1198, 106 S. Ct. 1199 (1986) (finding no First Amendment right of freedom of association for prisoners to have physical association). Courts have further held that constitutional

challenges asserting a right to visitation fail even to state a claim. *McCray*, 509 F.2d at 1334. Moreover, courts in this district have previously held that prisoner's constitutional rights are not implicated by the restriction of visitation. *O'Bryan v. County of Saginaw, Mich.* (O'Bryan III), 529 F. Supp. 206, 211 (E.D. Mich. 1981); *Mawby v. Ambroyer*, 568 F. Supp. 245, 249 (E.D. Mich. 1983).

This court is aware that other courts have come to a different conclusion. *See e.g., Laaman v. Helgemoe*, 437 F. Supp. 269, 320 (1977) (and cases cited therein); *Nicholson v. Choctaw County*, 498 F. Supp. 295, 310 (S.D. Ala. 1980). Yet the stronger reasoning and weight of authority lead this court to find that no First Amendment right of freedom of association exists for prisoners.

Plaintiffs next argue that the visitation rules restricting which minor children may visit a prison violate their Fourteenth Amendment fundamental right to family integrity. The Fourteenth Amendment prohibits a State from depriving a person of life, liberty, or property without due process of law and protects "the individual against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558, 41 L. Ed. 2d 935, 94 S. Ct. 2963 (1974). Plaintiffs are attempting to extend the analysis and reasoning of *Moore v. City of East Cleveland*, 431 U.S. 494, 52 L. Ed. 2d 531, 97 S. Ct. 1932 (1977) (plurality opinion), to the current context.

In *Moore*, the Court struck down the city's zoning laws which prohibited a grandmother from living with her son and her grandson. *Id.* The Court held that the concept of liberty in the Fourteenth Amendment includes the right to associate and reside with one's relatives. *Id.* The Plaintiffs here argue that the new rules impermissibly interfere with family relationships as did the zoning ordinance in *Moore*, and thus violate the Plaintiffs' liberty interest in family association.

Plaintiffs' argument is unavailing. The Supreme Court in *Moore* was concerned with the fact that a grandmother and

grandson could not live together. In this case, grandparents and parents may see their minor grandchildren and children. The Plaintiffs are seeking to extend the reasoning of *Moore* to even further extensions of the family tree. While dicta in *Moore* discusses extended family relationships, holding for the Plaintiffs in this case would go well beyond established precedent. Furthermore, *Moore* involved free citizens who wished to live together. That case is quite factually distinct from the current case where prisoners are petitioning for visitation rights. Incarceration by its very nature necessarily restricts the familial relationship in ways that would be unacceptable in free society: imprisonment deprives inmates of the freedom "to be with family and friends and to form the other enduring attachments of normal life." *Morrissey v. Brewer*, 408 U.S. 471, 482, 33 L. Ed. 2d 484, 92 S. Ct. 2593 (1972). For example, it is well established that prisoners have no right to conjugal visits. *Turner*, 482 U.S. at 95-96. The new regulations do not infringe upon the Plaintiffs' fundamental right of family integrity.

The Plaintiffs also contend that the rules restricting visitation are cruel and unusual punishment in violation of the Eighth Amendment. Eighth Amendment violations occur when prison conditions result in the "unnecessary and wanton infliction of pain," are "grossly disproportionate to the severity of the crime warranting imprisonment," or result in an "unquestioned and serious deprivation of basic human needs." *Rhodes v. Chapman*, 452 U.S. 337, 346-47, 69 L. Ed. 2d 59, 101 S. Ct. 2392 (1981). However, "to the extent that conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offense against society." *Id.* at 347. The Sixth Circuit has indicated that prohibiting visitation to prisoners does not violate the Eighth Amendment. *Bellamy v. Bradley*, 729 F.2d 416 (6th Cir. 1984). Plaintiffs, therefore, have no claim that the regulations violate the Eighth Amendment.

b. Rule prohibiting prisoners from visiting with their natural children if their parental rights have been terminated for any reason.

Parents who terminate their parental rights lose all constitutional rights in regard to those children upon entrance of the termination order. *See Davis v. Thornburgh*, 903 F.2d 212, 220 (3d Cir. 1990). Thus, the children are treated as non-family members. Once again, prisoners have no absolute constitutional right to visitation with strangers, and thus this rule does not violate any of the prisoners' rights.

c. Rule prohibiting minor children from visiting the prison unless accompanied by an immediate family member or adult legal guardian with proof of legal guardianship.

Assuming that *Moore* may be read to find a fundamental right of parents and grandparents to associate with their immediate family members within the prison context, any restriction on that right must be "reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89, 96 L. Ed. 2d 64, 107 S. Ct. 2254 (1987). In *Turner*, the Court listed four factors that courts should consider in determining whether such a prison regulation is reasonable:

1. whether a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it exists;

2. whether there are alternative ways for the prisoner to exercise the implicated constitutional right;

3. what impact would accommodation of the implicated constitutional right have on the prison administration;

4. whether the regulation is an exaggerated response to prison concerns.

Id. at 89-90.

The Defendants stated in their brief and during the preliminary injunction hearing, that their legitimate penological interests are: 1) preventing children from suffering physical and sexual abuse, 2) preventing children from being injured in the non-child-proofed visitation rooms, and 3) limiting the instances in which children can be used to smuggle weapons, drugs or other contraband into the prisons. Defendants further articulated that family members and guardians are best suited to controlling children.

Courts have consistently held that the maintenance of prison security and prevention of contraband from entering the prison are "legitimate penological" interests. *See Turner*, 482 U.S. at 92-93; *Procunier*, 416 U.S. at 413-14; *Bell v. Wolfish*, 441 U.S. 520, 60 L. Ed. 2d 447, 99 S. Ct. 1861 (1979). Having found the penological interest to be legitimate, then in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations[,] courts should ordinarily defer to [prison administrators'] expert judgment in such matters. *Block v. Rutherford*, 468 U.S. 576, 586-89, 82 L. Ed. 2d 438, 104 S. Ct. 3227 (1984). In this case, the Plaintiffs have failed to come forward with substantial evidence that the Michigan prison officials exaggerated their response. Moreover, Defendants articulated problems associated with supervising children and their position that family members are best suited to control a child. Having put forth a valid, legitimate interest, and in the absence of any evidence showing that officials have exaggerated their response, the court finds no constitutional violation.

d. Rules restricting members of the public to being on only one prisoner's visitation list at a time and prohibiting former prisoners from visiting prisoners other than immediate family.

As to the non-prisoner plaintiffs, their rights to visit prisoners are similarly restricted by the fact of the prisoner's incarceration. The court in *White* explained,

> It is the further opinion of this court that the Supreme Court itself has suggested there is no general right to prison visitation for either the prisoners or the public. In *Pell v. Procunier*, . . . the Court held that prisoners have no constitutional right to visit with members of the press and that members of the press have no constitutional right to visit with selected prisoners. Although the Court's principal concern was freedom of expression --press and speech-- rather than freedom of association, the result was nonetheless that the two groups had no right to visit with each other. Implicit in the Court's opinion is that prisoners have no right to associate face-to-face with any particular member of the public, and members of the public have no right to so associate with any particular prisoner. . . . The foregoing clearly explains why this court believes there is no right among prisoners to receive visitors. The court believes that the non-existence of a right among would-be visitors to visit prisoners is a necessary corollary whose justification is apparent by resort to the reductio ad absurdum.

White, 438 F. Supp. at 117-119 (aff'd per curiam). See also, *Fennell v. Carlson*, 466 F. Supp. 56, 59 (W.D. Okla. 1978).

Plaintiffs cite *Procunier v. Martinez* for the proposition that this rule should be evaluated under the higher strict

scrutiny standard because the rights of non-prisoners are implicated. That case did not hold that all cases implicating the rights of non-prisoners should be evaluated under strict scrutiny, rather, it held that prison regulations censoring a non-prisoner's mail restricted the non-prisoner's First Amendment rights, and as such had to be evaluated under the strict scrutiny standard. Courts have consistently distinguished between the rights of prisoners to communicate by way of mail and the ability of prisoners to receive visitors. Whereas First Amendment rights are implicated in the censorship of mail, prisoners and visitors have no First Amendment right to visitation because alternative means of exercising their First Amendment rights are available. Hence, no constitutional right is implicated by this rule.

e. Rule permitting prison officials to permanently deny all visitation privileges upon two major misconducts involving substance abuse

This rule is discretionary, and at this time, Plaintiffs cannot demonstrate that any person of their class will be permanently deprived of all visitation upon two major misconducts involving substance abuse. Thus, this claim is not ripe for the court to adjudicate.

B. Irreparable Injury, Balance of Harms and Public Interest

Even assuming that the court would find that the Plaintiffs have met their burden as to these factors, since the Plaintiffs cannot show that a "serious question" as to the merits exists, this court cannot find in their favor.

IV. The Eleventh Amendment

As a final matter, the Defendants contend that the Plaintiffs' have effectively sued the State of Michigan, and thus, this lawsuit is barred by the Eleventh Amendment. The Eleventh Amendment bars suits against a State or its agencies unless the State waives its immunity or Congress specifically abrogates the State's immunity. Claims for injunctive and declaratory relief made against state officials in their official capacity, such as those made in this case, however, are not barred by the Eleventh Amendment. *Doe v. Wigginton*, 21 F.3d 733, 737 (6th Cir. 1994) (citing *Edelman v. Jordan*, 415 U.S. 651, 688, 39 L. Ed. 2d 662, 94 S. Ct. 1347; *Ex Parte Young*, 209 U.S. 123, 159-60, 52 L. Ed. 714, 28 S. Ct. 441).

V. Conclusion

Being fully advised on the merits and the pleadings, for the foregoing reasons, the court hereby DENIES Plaintiffs' motion for preliminary injunction.

NANCY G. EDMUNDS
U.S. District Judge

Dated: OCT 06 1995

The First Amendment of the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment of the United States Constitution provides, in relevant part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No States shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any States deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or

other proper proceeding for redress.

28 U.S.C. §1343 provides in pertinent part:

> (a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> * * *
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
>
> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

MICHIGAN REGISTER, August 1995
MICHIGAN DEPARTMENT OF CORRECTIONS
ADMINISTRATIVE RULES

R 791.6609 Limits on visitation.

Rule 609. (1) Except as otherwise provided in this rule, any person who is not subject to a current visitor restriction pursuant to the provisions of R 791.6611 may visit a prisoner if all of the following provisions are complied with:

(a) The person presents valid and adequate proof of identification.

(b) The person is on the prisoner's list of approved visitors, as provided in subrule (2) of this rule.

(c) The visit is within the allowable quota established by the department.

(d) The visit does not constitute a threat to the prisoner's physical or mental well-being.

(e) The visit does not constitute a threat to public safety or to the order and security of the institution.

(f) Allowing the visit is not harmful to the prisoner's rehabilitation.

(g) The purpose of the visit is not to commit an illegal act.

(2) Except as provided in R 791.6607(2) and subrule (3) of this rule, a person may visit a prisoner only if he or she is on the list of approved visitors for that prisoner, which shall consist of the prisoner's immediate family members and not more than 10 other persons. The approved visitors list shall be subject to all of the following restrictions:

(a) A person may be on the approved visitors list of any prisoner to whom she or he is related as an immediate family member, but shall be on the list of only 1 prisoner at a time to whom she or he is not related as an immediate family member.

(b) A person on an approved visitor list shall be not less than 18 years of age, unless he or she is the child, stepchild, or grandchild of the prisoner or an emancipated minor who can show proof of emancipation.

(c) If the person is claimed to be an immediate family member, the prisoner shall present adequate proof of the relationship, as determined by the warden or his or her :.

(d) A prisoner may add or delete names of immediate family members from his or her approved visitors list any time, but shall be allowed to add or delete other names only

once ever 6 months.

(e) A person shall be removed from a prisoner's approved visitors list upon written request by the listed person.

(f) A warden may deny placement of anyone on a prisoner's approved visitors list for reasons of safety or security of the institution, protection of the public, previous violations of visiting room rules by the person, or for other cause as determined by the warden. A denial of placement on the list may be appealed through the prisoner grievance process.

(3) The warden may allow a single visit between a prisoner and a person who is not on the approved visitors list of the prisoner if the warden determines the visit is in the best interest of the prisoner and is not a threat to the good order and security of the facility.

(4) Each institution shall prescribe and display reasonable rules of conduct for visits to preserve public safety and institutional security and order and to prevent conduct that may be offensive to others who may be present. If a prisoner or visitor violates the provisions of this subrule, then the visit may be terminated and the prisoner and visitor may be subject to sanctions up to and including a permanent restriction of all visits or restriction to noncontact visiting only.

(5) Subject to the restrictions in subrule (6) of this rule, a child who is under the age of 18 may visit a prisoner only if the child is on the prisoner's approved visitors list and is accompanied by an adult immediate family member or a legal guardian, unless the individual is an emancipated minor.

(6) A child who is under the age of 18 shall not be permitted to visit if any of the following provisions apply:

(a) The parental rights of the prisoner to the child have been terminated.

(b) There is a court order prohibiting visits between the

child and the prisoner.

(c) The prisoner has been convicted of child abuse, criminal sexual conduct, or any other assaultive or violent behavior against the child or a sibling o the child, unless specific approval for the visit has been granted by the director.

(7) Except as provided in subrule (8) of this rule, a prisoner, a former prisoner, a probationer, or a parolee shall not be allowed to visit with a prisoner unless the person is on the prisoner's approved visitors list and all of the following criteria are met:

(a) The person is an immediate family member of the prisoner.

(b) Prior approval for the visit is obtained from the warden of the institution where the visit will occur.

(c) In the case of a probationer or parolee, prior approval for the visit is obtained from the warden of the institution and the supervising field agent.

(8) A former prisoner shall be allowed to visit if she or he is one of the individuals identified in R 791.6607(2).

(9) For purposes of this rule, "immediate family member" means any of the following persons:

(a) Grandparent.

(b) Parent.

(c) Stepparent.

(d) Spouse.

(e) Mother-in-law or father-in-law.

(f) Child.

(g) Stepchild.

(h) Grandchild.

(i) Sibling.

(j) Stepbrother or stepsister.

(k) Aunts and uncles if verification is provided that they served as surrogate parents.

(10) A prisoner who is hospitalized may receive visitors only if he or she is critically ill, as verified by the attending physician, and prior approval is granted by the warden or deputy warden.

(11) The director may permanently restrict all visitation privileges, except with an attorney or member of the clergy, for a prisoner who is convicted or found guilty of any of the following:

(a) A felony or misdemeanor that occurs during a visit.

(b) A major misconduct violation, as defined in R 791.5501, that occurs during a visit or is associated with a visit.

(c) An escape, attempted escape, or conspiracy to escape.

(d) Two or more violations of the major misconduct charge of substance abuse.

(12) The director may grant reconsideration and removal of a permanent visitor restriction of all visitation privileges that is imposed pursuant to subrule (11) of this rule.

(13) Nothing in this rule creates an enforceable right of the prisoner to receive a visit or of a visitor to visit a prisoner.

R 791.6614 Noncontact visitation.

Rule 614. (1) Visits by members of the public with prisoners who are classified to security levels V, VI, and segregation and who are housed in an institution or housing unit of that security level may be limited to noncontact visits, except that a contact visit between a prisoner and his or her attorney shall be allowed if requested by the attorney, except as provided in subrule (2) of this rule.

(2) Visits by members of the public with prisoners who are housed in any security level may be limited to noncontact visits for any of the following reasons:

(a) A search of the visitor pursuant to the provisions of R 791.2210 cannot be conducted due to the presence of a cast, prosthetic device, oxygen tank, or any medically required device.

(b) A prisoner is being monitored for suicidal behavior and noncontact visiting is determined by the warden to be necessary to ensure the prisoner's physical safety.

(c) It is determined by the warden, based on a review of a hearing officer's finding of guilt of a major misconduct charge or upholding of a visitor restriction, that a prisoner or visitor demonstrates unmanageable behavior that is related to contact visiting.

(d) A prisoner is found guilty of a major misconduct violation of substance abuse.

(3) Notwithstanding the provisions of subrules (1) and (2) of this rule, contact visits between a prisoner and staff from the office of the legislative corrections ombudsman shall be allowed if requested by the ombudsman's staff member.